MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 18, 2008 to December 30, 2008

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
CLIFFORD W. TAYLOR, Laingsburg	2009
Justices	
MICHAEL F. CAVANAGH, East Lansing,	2015
ELIZABETH A. WEAVER, Glen Arbor,	2011
MARILYN KELLY, Bloomfield Hills,	2013
MAURA D. CORRIGAN, Grosse Pointe Park,	2015
ROBERT P. YOUNG, Jr., Grosse Pointe Park,	2011
STEPHEN J. MARKMAN, Mason,	2013

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

JOHN K. PARKER	DANIEL C. BRUBAKER
TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON	GARY L. ROGERS
KATHLEEN A. FOSTER	RICHARD B. LESLIE
NELSON S. LEAVITT	FREDERICK M. BAKER, Jr.
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
ANNE-MARIE HYNOUS VOICE	RUTH E. ZIMMERMAN
DON W. ATKINS	SAMUEL R. SMITH
JÜRGEN O. SKOPPEK	ANNE E. ALBERS

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO
Reporter of Decisions: DANILO ANSELMO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
HENRY WILLIAM SAAD, Bloomfield Hills,	2009
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY, Grosse Pointe Farms,	2009
Judges	
DAVID H. SAWYER, Grand Rapids,	2011
WILLIAM B. MURPHY, Grand Rapids,	2013
MARK J. CAVANAGH, Royal Oak,	2009
KATHLEEN JANSEN, St. Clair Shores,	2013
E. THOMAS FITZGERALD, Owosso,	2009
HELENE N. WHITE, Detroit,	2011[1]
RICHARD A. BANDSTRA, Grand Rapids,	2009
JOEL P. HOEKSTRA, Grand Rapids,	2011
JANE E. MARKEY, Grand Rapids,	2009
PETER D. O'CONNELL, Mt. Pleasant,	2013
MICHAEL R. SMOLENSKI, Middleville,	2013
WILLIAM C. WHITBECK, Lansing,	2011
MICHAEL J. TALBOT, Grosse Pointe Farms,	2009
KURTIS T. WILDER, Canton,	2011
BRIAN K. ZAHRA, Northville,	2013
PATRICK M. METER, Saginaw,	2009
DONALD S. OWENS, Williamston,	2011
KIRSTEN FRANK KELLY, Grosse Pointe Park,	2013
PAT M. DONOFRIO, Macomb Township,	2011
KAREN FORT HOOD, Detroit,	2009
BILL SCHUETTE, Midland,	2009
STEPHEN L. BORRELLO, Saginaw,	2013
ALTON T. DAVIS, Grayling,	2009
DEBORAH A. SERVITTO, Mt. Clemens,	2013
JANE M. BECKERING, Grand Rapids,	2009
ELIZABETH L. GLEICHER, Pleasant Ridge,	2009
CYNTHIA DIANE STEPHENS, Detroit,	2011[2]

Chief Clerk: SANDRA SCHULTZ MENGEL

Research Director: LARRY S. ROYSTER

[1] To August 11, 2008.

[2] From December 30, 2008.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH, Jonesville,	2009
2.	ALFRED M. BUTZBAUGH, Berrien Springs,	2013
	JOHN E. DEWANE, St. Joseph,	2009
	JOHN M. DONAHUE, St. Joseph,	2011
	CHARLES T. LaSATA, Benton Harbor,	2011
3.	DEBORAH ROSS ADAMS, Detroit,	2013
	DAVID J. ALLEN, Detroit,	2009
	WENDY M. BAXTER, Detroit,	2013
	ANNETTE J. BERRY, Plymouth,	2013
	GREGORY D. BILL, Northville Township,	2013
	SUSAN D. BORMAN, Detroit,	2009
	ULYSSES W. BOYKIN, Detroit,	2009
	MARGIE R. BRAXTON, Detroit,	2011
	MEGAN MAHER BRENNAN, Grosse Pointe Park,	2009
	HELEN E. BROWN, Grosse Pointe Park,	2009[1]
	BILL CALLAHAN, Detroit,	2009
	JAMES A. CALLAHAN, Grosse Pointe,	2011
	MICHAEL J. CALLAHAN, Belleville,	2009
	JEROME C. CAVANAGH, Hamtramck,	2013
	JAMES R. CHYLINSKI, Grosse Pointe Woods,	2011
	ROBERT J. COLOMBO, Jr., Grosse Pointe,	2013
	DAPHNE MEANS CURTIS, Detroit,	2009
	CHRISTOPHER D. DINGELL, Trenton,	2009
	GERSHWIN ALLEN DRAIN, Detroit,	2011
	PRENTIS EDWARDS, Detroit,	2013
	CHARLENE M. ELDER, Dearborn,	2009
	VONDA R. EVANS, Dearborn,	2009
	EDWARD EWELL, Jr., Detroit,	2013
	PATRICIA SUSAN FRESARD, Grosse Pointe Woods,	2011
	SHEILA ANN GIBSON, Detroit,	2011
	JOHN H. GILLIS, Jr., Grosse Pointe,	2009
	WILLIAM J. GIOVAN, Grosse Pointe Farms,	2009
	DAVID ALAN GRONER, Grosse Pointe Park,	2011

[1] To November 1, 2008.

		Term Expires January 1 of
	RICHARD B. HALLORAN, Jr., Detroit,	2013
	AMY PATRICIA HATHAWAY, Grosse Pointe Park,	2013
	CYNTHIA GRAY HATHAWAY, Detroit,	2011
	DIANE MARIE HATHAWAY, Grosse Pointe Park,	2011
	MICHAEL M. HATHAWAY, Detroit,	2011
	MURIEL D. HUGHES, Grosse Pointe Woods,	2009
	THOMAS EDWARD JACKSON, Detroit,	2013
	VERA MASSEY JONES, Detroit,	2009
	MARY BETH KELLY, Grosse Ile,	2009
	TIMOTHY MICHAEL KENNY, Livonia,	2011
	ARTHUR J. LOMBARD, Grosse Pointe Farms,	2009
	KATHLEEN I. MACDONALD, Grosse Pointe Woods,	2011
	KATHLEEN M. McCARTHY, Dearborn,	2013
	WADE H. McCREE, Detroit,	2009
	WARFIELD MOORE, Jr., Detroit,	2009
	BRUCE U. MORROW, Detroit,	2011
	JOHN A. MURPHY, Plymouth Township,	2011
	MARIA L. OXHOLM, Detroit,	2013
	LITA MASINI POPKE, Canton,	2011
	DANIEL P. RYAN, Redford,	2013
	MICHAEL F. SAPALA, Grosse Pointe Park,	2013
	RICHARD M. SKUTT, Detroit,	2009
	MARK T. SLAVENS, Canton,	2011
	LESLIE KIM SMITH, Northville Township,	2013
	VIRGIL C. SMITH, Detroit,	2013
	JEANNE STEMPIEN, Northville,	2011
	CYNTHIA DIANE STEPHENS, Detroit,	2013
	CRAIG S. STRONG, Detroit,	2009
	BRIAN R. SULLIVAN, Grosse Pointe Park,	2011
	DEBORAH A. THOMAS, Detroit,	2013
	ISIDORE B. TORRES, Grosse Pointe Park,	2011
	CAROLE F. YOUNGBLOOD, Grosse Pointe,	2013
	ROBERT L. ZIOLKOWSKI, Northville,	2009
4.	SUSAN E. BEEBE, Jackson,	2011
	JOHN G. McBAIN, Jr., Rives Junction,	2009
	CHAD C. SCHMUCKER, Jackson,	2011
	THOMAS D. WILSON, Grasslake,	2013
5.	JAMES H. FISHER, Hastings,	2009
6.	JAMES M. ALEXANDER, Bloomfield Hills,	2009
	MARTHA ANDERSON, Troy,	2009
	STEVEN N. ANDREWS, Bloomfield Hills,	2009
	LEO BOWMAN, Pontiac,	2009
	RAE LEE CHABOT, Franklin,	2011

		Term Expires January 1 of
	MARK A. GOLDSMITH, Huntington Woods,	2013
	NANCI J. GRANT, Bloomfield Hills,	2009
	SHALINA D. KUMAR, Birmingham,	2009
	DENISE LANGFORD MORRIS, West Bloomfield,	2013
	CHERYL A. MATTHEWS, Sylvan Lake,	2011
	JOHN JAMES McDONALD, Farmington Hills,	2011
	FRED M. MESTER, Bloomfield Hills,	2009
	RUDY J. NICHOLS, Clarkston,	2009
	COLLEEN A. O'BRIEN, Rochester Hills,	2011
	DANIEL PATRICK O'BRIEN, Troy,	2011
	WENDY LYNN POTTS, Birmingham,	2013
	EDWARD SOSNICK, Bloomfield Hills,	2013
	MICHAEL D. WARREN, Jr., Beverly Hills,	2013
	JOAN E. YOUNG, Bloomfield Village,	2011
7.	DUNCAN M. BEAGLE, Fenton,	2011
	JOSEPH J. FARAH, Grand Blanc,	2011
	JUDITH A. FULLERTON, Flint,	2013
	JOHN A. GADOLA, Fenton,	2009
	ARCHIE L. HAYMAN, Flint,	2013
	GEOFFREY L. NEITHERCUT, Flint,	2013
	DAVID J. NEWBLATT, Linden,	2011
	MICHAEL J. THEILE, Flushing,	2009
	RICHARD B. YUILLE, Flint,	2009
8.	DAVID A. HOORT, Portland,	2011
	CHARLES H. MIEL, Stanton,	2009
9.	GARY C. GIGUERE Jr., Portage,	2009
	STEPHEN D. GORSALITZ, Portage,	2011
	J. RICHARDSON JOHNSON, Portage,	2011
	PAMELA L. LIGHTVOET, Kalamazoo,	2013
10.	JANET M. BOES, Saginaw,	2013[2]
	FRED L. BORCHARD, Saginaw,	2011
	WILLIAM A. CRANE, Saginaw,	2011
	DARNELL JACKSON, Saginaw,	2013
	ROBERT L. KACZMAREK, Freeland,	2009
11.	CHARLES H. STARK, Munising,	2009
12.	GARFIELD W. HOOD, Pelkie,	2009[3]
13.	THOMAS G. POWER, Traverse City,	2011
	PHILIP E. RODGERS, Jr., Traverse City,	2009
14.	JAMES M. GRAVES, Jr., Muskegon,	2013
	TIMOTHY G. HICKS, Montague,	2011
	WILLIAM C. MARIETTI, North Muskegon,	2011

[2] From September 8, 2008.

[3] To September 30, 2008.

		Term Expires January 1 of
	JOHN C. RUCK, Whitehall,	2009
15.	MICHAEL H. CHERRY, Coldwater,	2009
16.	JAMES M. BIERNAT, Sr., Clinton Township,	2011
	RICHARD L. CARETTI, Fraser,	2011
	MARY A. CHRZANOWSKI, Harrison Township,	2011
	DIANE M. DRUZINSKI, Shelby Township,	2009
	JOHN C. FOSTER, Clinton Township,	2009
	PETER J. MACERONI, Clinton Township,	2009
	DONALD G. MILLER, Harrison Township,	2013
	EDWARD A. SERVITTO, Jr., Warren,	2013
	MARK S. SWITALSKI, Ray Township,	2013
	MATTHEW S. SWITALSKI, Clinton Township,	2009
	ANTONIO P. VIVIANO, Clinton Township,	2011
	DAVID VIVIANO, Sterling Heights,	2013
	TRACEY A. YOKICH, St. Clair Shores,	2013
17.	GEORGE S. BUTH, Grand Rapids,	2011
	KATHLEEN A. FEENEY, Rockford,	2009
	DONALD A. JOHNSTON, III, Grand Rapids,	2013
	DENNIS B. LEIBER, Grand Rapids,	2013
	STEVEN MITCHELL PESTKA, Grand Rapids,	2011
	JAMES ROBERT REDFORD, East Grand Rapids,	2011
	PAUL J. SULLIVAN, Grand Rapids,	2009
	MARK A. TRUSOCK, Comstock Park,	2013
	CHRISTOPHER P. YATES, East Grand Rapids,	2013
	DANIEL V. ZEMAITIS, Grand Rapids,	2009
18.	WILLIAM J. CAPRATHE, Bay City,	2011
	KENNETH W. SCHMIDT, Bay City,	2013
	JOSEPH K. SHEERAN, Essexville,	2009
19.	JAMES M. BATZER, Manistee,	2009
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	JON H. HULSING, Jenison,	2009
	EDWARD R. POST, Grand Haven,	2011
	JON VAN ALLSBURG, Holland,	2013
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013
22.	ARCHIE CAMERON BROWN, Ann Arbor,	2011
	TIMOTHY P. CONNORS, Ann Arbor,	2013
	MELINDA MORRIS, Ann Arbor,	2013
	DONALD E. SHELTON, Saline,	2009
	DAVID S. SWARTZ, Ann Arbor,	2009
23.	RONALD M. BERGERON, Standish,	2009
	WILLIAM F. MYLES, East Tawas,	2009
24.	DONALD A. TEEPLE, Sandusky,	2009
25.	THOMAS L. SOLKA, Marquette,	2011

		Term Expires January 1 of
	JOHN R. WEBER, Marquette,	2009
26.	JOHN F. KOWALSKI, Alpena,	2009
27.	ANTHONY A. MONTON, Pentwater,	2013
	TERRENCE R. THOMAS, Newaygo,	2009
28.	WILLIAM M. FAGERMAN, Cadillac,	2009
29.	MICHELLE M. RICK, DeWitt,	2011
	RANDY L. TAHVONEN, Elsie,	2009
30.	LAURA BAIRD, Okemos,	2013
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011
	JAMES R. GIDDINGS, Williamston,	2011
	JANELLE A. LAWLESS, Okemos,	2009
	PAULA J.M. MANDERFIELD, East Lansing,	2013
31.	JAMES P. ADAIR, Port Huron,	2013
	PETER E. DEEGAN, Port Huron,	2011
	DANIEL J. KELLY, Fort Gratiot,	2009
32.	ROY D. GOTHAM, Bessemer,	2009
33.	RICHARD M. PAJTAS, Charlevoix,	2009
34.	MICHAEL J. BAUMGARTNER, Prudenville,	2011
35.	GERALD D. LOSTRACCO, Owosso,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2013
	PAUL E. HAMRE, Lawton,	2009
37.	ALLEN L. GARBRECHT, Battle Creek,	2011
	JAMES C. KINGSLEY, Albion,	2009
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2013
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2013
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2013
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	MICHAEL J. BEALE, Midland,	2009
	JONATHAN E. LAUDERBACH, Midland,	2013
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2013
	DAVID READER, Howell,	2011
45.	PAUL E. STUTESMAN, Three Rivers,	2013
46.	JANET M. ALLEN, Gaylord,	2011
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011

		Term Expires January 1 of
48.	WILLIAM A. BAILLARGEON, Saugatuck,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2013
	RONALD C. NICHOLS, Big Rapids,	2015
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2013
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Port Austin,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2013
55.	THOMAS R. EVANS, Beaverton,	2009
	ROY G. MIENK, Gladwin,	2013
56.	THOMAS S. EVELAND, Dimondale,	2013
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2013

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH, Monroe,	2009
	TERRENCE P. BRONSON, Monroe,	2013
	JACK VITALE, Monroe,	2011
2A.	NATALIA M. KOSELKA, Adrian,	2011
	JAMES E. SHERIDAN, Adrian,	2009
2B.	DONALD L. SANDERSON, Hillsdale,	2009
3A.	DAVID T. COYLE, Coldwater,	2009
3B.	JEFFREY C. MIDDLETON, Three Rivers,	2009
	WILLIAM D. WELTY, Three Rivers,	2013
4.	PAUL E. DEATS, Edwardsburg,	2009
5.	GARY J. BRUCE, St. Joseph,	2011
	ANGELA PASULA, Stevensville,	2009
	SCOTT SCHOFIELD, Niles,	2009
	STERLING R. SCHROCK, St. Joseph,	2011[1]
	LYNDA A. TOLEN, Stevensville,	2013[2]
	DENNIS M. WILEY, St. Joseph,	2011
7.	ARTHUR H. CLARKE, III, South Haven,	2009
	ROBERT T. HENTCHEL, Paw Paw,	2011
8-1.	QUINN E. BENSON, Kalamazoo,	2009
	ANNE E. BLATCHFORD, Kalamazoo,	2011
	PAUL J. BRIDENSTINE, Kalamazoo,	2013
	CAROL A. HUSUM, Kalamazoo,	2011
8-2.	ROBERT C. KROPF, Portage,	2009
8-3.	RICHARD A. SANTONI, Kalamazoo,	2009
	VINCENT C. WESTRA, Kalamazoo,	2011
10.	SAMUEL I. DURHAM, Jr., Battle Creek,	2011
	JOHN R. HOLMES, Battle Creek,	2013
	FRANKLIN K. LINE, Jr., Marshall,	2009
	MARVIN RATNER, Battle Creek,	2009
12.	JOSEPH S. FILIP, Jackson,	2011
	JAMES M. JUSTIN, Jackson,	2013
	MICHAEL J. KLAEREN, Jackson,	2009
	R. DARRYL MAZUR, Jackson,	2009
14A.	RICHARD E. CONLIN, Ann Arbor,	2009

[1] From December 15, 2008.

[2] To August 1, 2008.

		Term Expires January 1 of
	J. CEDRIC SIMPSON, Ypsilanti,	2013
	KIRK W. TABBEY, Saline,	2011
14B.	JOHN B. COLLINS, Ypsilanti,	2009
15.	JULIE CREAL, Ann Arbor,	2013
	ELIZABETH POLLARD HINES, Ann Arbor,	2011
	ANN E. MATTSON, Ann Arbor,	2009
16.	ROBERT B. BRZEZINSKI, Livonia,	2009
	KATHLEEN J. McCANN, Livonia,	2013
17.	KAREN KHALIL, Redford,	2011
	CHARLOTTE L. WIRTH, Redford,	2009
18.	C. CHARLES BOKOS, Westland,	2009
	SANDRA A. CICIRELLI, Westland,	2013
19.	WILLIAM C. HULTGREN, Dearborn,	2011
	MARK W. SOMERS, Dearborn,	2009
	RICHARD WYGONIK, Dearborn,	2013
20.	MARK J. PLAWECKI, Dearborn Heights,	2009
	DAVID TURFE, Dearborn Heights,	2013
21.	RICHARD L. HAMMER, Jr., Garden City,	2009
22.	SYLVIA A. JAMES, Inkster,	2013
23.	GENO SALOMONE, Taylor,	2013
	WILLIAM J. SUTHERLAND, Taylor,	2009
24.	JOHN T. COURTRIGHT, Allen Park,	2009
	RICHARD A. PAGE, Allen Park,	2011
25.	DAVID A. BAJOREK, Lincoln Park,	2009
	DAVID J. ZELENAK, Lincoln Park,	2011
26-1.	RAYMOND A. CHARRON, River Rouge,	2009
26-2.	MICHAEL F. CIUNGAN, Ecorse,	2009
27.	RANDY L. KALMBACH, Wyandotte,	2013
28.	JAMES A. KANDREVAS, Southgate,	2009
29.	LAURA REDMOND MACK, Wayne,	2013
30.	BRIGETTE R. OFFICER, Highland Park,	2011
31.	PAUL J. PARUK, Hamtramck,	2009
32A.	ROGER J. La ROSE, Harper Woods,	2009
33.	JAMES KURT KERSTEN, Trenton,	2009
	MICHAEL K. McNALLY, Trenton,	2013
	EDWARD J. NYKIEL, Grosse Ile,	2011
34.	TINA BROOKS GREEN, New Boston,	2013
	BRIAN A. OAKLEY, Romulus,	2011
	DAVID M. PARROTT, Belleville,	2009
35.	MICHAEL J. GEROU, Plymouth,	2011
	RONALD W. LOWE, Canton,	2013
	JOHN E. MacDONALD, Northville,	2009
36.	LYDIA NANCE ADAMS, Detroit,	2011
	ROBERTA C. ARCHER, Detroit,	2013
	MARYLIN E. ATKINS, Detroit,	2013
	JOSEPH N. BALTIMORE, Detroit,	2009
	NANCY McCAUGHAN BLOUNT, Detroit,	2009
	IZETTA F. BRIGHT, Detroit,	2011
	ESTHER LYNISE BRYANT-WEEKES, Detroit,	2008

		Term Expires January 1 of
	RUTH C. CARTER, Detroit,	2011
	DONALD COLEMAN, Detroit,	2013
	NANCY A. FARMER, Detroit,	2013
	DEBORAH GERALDINE FORD, Detroit,	2011
	RUTH ANN GARRETT, Detroit,	2013
	RONALD GILES, Detroit,	2013
	JIMMYLEE GRAY, Detroit,	2009
	KATHERINE HANSEN, Detroit,	2011
	BEVERLY J. HAYES-SIPES, Detroit,	2009
	PAULA G. HUMPHRIES, Detroit,	2011
	PATRICIA L. JEFFERSON, Detroit,	2009
	VANESA F. JONES-BRADLEY, Detroit,	2013
	KENNETH J. KING, Detroit,	2009
	DEBORAH L. LANGSTON, Detroit,	2013
	WILLIE G. LIPSCOMB, Jr., Detroit,	2009
	LEONIA J. LLOYD, Detroit,	2011
	MIRIAM B. MARTIN-CLARK, Detroit,	2011
	DONNA R. MILHOUSE, Detroit,	2013
	B. PENNIE MILLENDER, Detroit,	2011
	CYLENTHIA L. MILLER, Detroit,	2011
	MARK A. RANDON, Detroit,	2009
	KEVIN F. ROBBINS, Detroit,	2013
	DAVID S. ROBINSON, Jr., Detroit,	2013
	C. LORENE ROYSTER, Detroit,	2013
37.	JOHN M. CHMURA, Warren,	2013
	JENNIFER FAUNCE, Warren,	2009
	DAWNN M. GRUENBURG, Warren,	2011
	WALTER A. JAKUBOWSKI, Jr., Warren,	2013[3]
	MATTHEW P. SABAUGH, Warren,	2013[4]
38.	NORENE S. REDMOND, Eastpointe,	2009
39.	JOSEPH F. BOEDEKER, Roseville,	2009
	MARCO A. SANTIA, Fraser,	2013
	CATHERINE B. STEENLAND, Roseville,	2011
40.	MARK A. FRATARCANGELI, St. Clair Shores,	2013
	JOSEPH CRAIGEN OSTER, St. Clair Shores,	2009
41A.	MICHAEL S. MACERONI, Sterling Heights,	2009
	DOUGLAS P. SHEPHERD, Macomb Township,	2013
	STEPHEN S. SIERAWSKI, Sterling Heights,	2011
	KIMBERLEY ANNE WIEGAND, Sterling Heights,	2013
41B.	LINDA DAVIS, Clinton Township,	2009
	SEBASTIAN LUCIDO, Clinton Township,	2013
	SHEILA A. MILLER, Clinton Township,	2011
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2013
43.	KEITH P. HUNT, Ferndale,	2013

[3] To October 1, 2008.

[4] To December 8, 2008.

		Term Expires January 1 of
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2013
45A.	WILLIAM R. SAUER, Berkley,	2009
45B.	MICHELLE FRIEDMAN APPEL, Huntington Woods,	2009
	DAVID M. GUBOW, Huntington Woods,	2009
46.	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2013
	WILLIAM J. RICHARDS, Beverly Hills,	2009
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	MARC BARRON, Birmingham,	2011
	DIANE D'AGOSTINI, Bloomfield Hills,	2013
	KIMBERLY SMALL, West Bloomfield,	2009
50.	MICHAEL C. MARTINEZ, Pontiac,	2009
	PRESTON G. THOMAS, Pontiac,	2011
	CYNTHIA THOMAS WALKER, Pontiac,	2009
51.	RICHARD D. KUHN, Jr., Waterford,	2009
	PHYLLIS C. McMILLEN, Waterford,	2013
52-1.	ROBERT BONDY, Milford,	2013
	BRIAN W. MacKENZIE, Novi,	2009
	DENNIS N. POWERS, Highland,	2013
52-2.	DANA FORTINBERRY, Clarkston,	2009
	KELLEY RENAE KOSTIN, Clarkston,	2011
52-3.	LISA L. ASADOORIAN, Rochester Hills,	2013
	NANCY TOLWIN CARNIAK, Rochester Hills,	2011
	JULIE A. NICHOLSON, Rochester Hills,	2009
52-4.	WILLIAM E. BOLLE, Troy,	2009
	DENNIS C. DRURY, Troy,	2013
	MICHAEL A. MARTONE, Troy,	2011
53.	THERESA M. BRENNAN, Brighton,	2009
	L. SUZANNE GEDDIS, Brighton,	2011
	CAROL SUE READER, Howell,	2013
54A.	LOUISE ALDERSON, Lansing,	2011
	PATRICK F. CHERRY, Lansing,	2009
	FRANK J. DeLUCA, Lansing,	2013
	CHARLES F. FILICE, Lansing,	2009
	AMY R. KRAUSE, Lansing,	2011
54B.	RICHARD D. BALL, East Lansing,	2011
	DAVID L. JORDON, East Lansing,	2013
55.	ROSEMARIE ELIZABETH AQUILINA, East Lansing,	2011
	THOMAS P. BOYD, Okemos,	2009
56A.	HARVEY J. HOFFMAN, Grand Ledge,	2011
	JULIE H. REINCKE, Eaton Rapids,	2009
56B.	GARY R. HOLMAN, Hastings,	2013
57.	STEPHEN E. SHERIDAN, Saugatuck,	2013
	JOSEPH S. SKOCELAS, Plainwell,	2009
58.	SUSAN A. JONAS, Spring Lake,	2009

		Term Expires January 1 of
	RICHARD J. KLOOTE, Grand Haven,	2013
	BRADLEY S. KNOLL, Holland,	2009
	KENNETH D. POST, Zeeland,	2011
59.	PETER P. VERSLUIS, Grand Rapids,	2011
60.	HAROLD F. CLOSZ, III, North Muskegon,	2009
	MARIA LADAS HOOPES, North Muskegon,	2009
	MICHAEL JEFFREY NOLAN, Twin Lake,	2013
	ANDREW WIERENGO, Muskegon,	2011
61.	PATRICK C. BOWLER, Grand Rapids,	2009
	DAVID J. BUTER, Grand Rapids,	2009
	J. MICHAEL CHRISTENSEN, Grand Rapids,	2011
	JEANINE NEMESI LaVILLE, Grand Rapids,	2013
	BEN H. LOGAN, II, Grand Rapids,	2013
	DONALD H. PASSENGER, Grand Rapids,	2011
62A.	PABLO CORTES, Wyoming,	2009
	STEVEN M. TIMMERS, Grandville,	2013
62B.	WILLIAM G. KELLY, Kentwood,	2009
63-1.	STEVEN R. SERVAAS, Rockford,	2009
63-2.	SARA J. SMOLENSKI, East Grand Rapids,	2009
64A.	RAYMOND P. VOET, Ionia,	2009
64B.	DONALD R. HEMINGSEN, Sheridan,	2009
65A.	RICHARD D. WELLS, DeWitt,	2009
65B.	JAMES B. MACKIE, Alma,	2009
66.	WARD L. CLARKSON, Corunna,	2013
	TERRANCE P. DIGNAN, Owosso,	2009
67-1.	DAVID J. GOGGINS, Flushing,	2009
67-2.	JOHN L. CONOVER, Davison,	2009
	RICHARD L. HUGHES, Otisville,	2011
67-3.	LARRY STECCO, Flushing,	2009
67-4.	MARK C. McCABE, Fenton,	2009
	CHRISTOPHER ODETTE, Grand Blanc,	2013
68.	TRACY L. COLLIER-NIX, Flint,	2009
	WILLIAM H. CRAWFORD, II, Flint,	2013
	MARY CATHERINE DOWD, Flint,	2011[5]
	HERMAN MARABLE, Jr., Flint,	2013
	NATHANIEL C. PERRY, III, Flint,	2009
70-1.	TERRY L. CLARK, Saginaw,	2013
	M. RANDALL JURRENS, Saginaw,	2011
	M. T. THOMPSON, Jr., Saginaw,	2009
70-2.	CHRISTOPHER S. BOYD, Saginaw,	2011
	ALFRED T. FRANK, Saginaw,	2009
	KYLE HIGGS TARRANT, Saginaw,	2013
71A.	LAURA CHEGER BARNARD, Metamora,	2009
	JOHN T. CONNOLLY, Lapeer,	2013
71B.	KIM DAVID GLASPIE, Cass City,	2009
72.	RICHARD A. COOLEY, Jr., Port Huron,	2011

[5] From August 23, 2008.

		Term Expires January 1 of
	JOHN D. MONAGHAN, Port Huron,	2013
	CYNTHIA SIEMEN PLATZER, Lakeport,	2009
73A.	JAMES A. MARCUS, Applegate,	2009
73B.	DAVID B. HERRINGTON, Bad Axe,	2009
74.	CRAIG D. ALSTON, Bay City,	2009
	TIMOTHY J. KELLY, Bay City,	2013
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	STEVEN CARRAS, Midland,	2011
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2013
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

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	Term Expires January 1 of
RUSSELL F. ETHRIDGE, Grosse Pointe,	2012
CARL F. JARBOE, Grosse Pointe Park,	2010
LYNNE A. PIERCE, Grosse Pointe Woods,	2012
MATTHEW R. RUMORA, Grosse Pointe Farms,	2010

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2013
Alger/Schoolcraft	WILLIAM W. CARMODY	2013
Allegan	MICHAEL L. BUCK	2013
Alpena	THOMAS J. LaCROSS	2013
Antrim	NORMAN R. HAYES	2013
Arenac	JACK WILLIAM SCULLY	2013
Baraga	TIMOTHY S. BRENNAN	2013
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2009
Berrien	THOMAS E. NELSON	2013
Branch	FREDERICK L. WOOD	2013
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2013
Cass	SUSAN L. DOBRICH	2013
Cheboygan	ROBERT JOHN BUTTS	2013
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2013
Clinton	LISA SULLIVAN	2013
Crawford	MONTE BURMEISTER	2013
Delta	ROBERT E. GOEBEL, Jr.	2013
Dickinson	THOMAS D. SLAGLE	2013
Eaton	MICHAEL F. SKINNER	2013
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2013
Genesee	JENNIE E. BARKEY	2009
Genesee	ROBERT E. WEISS	2013
Gogebic	JOEL L. MASSIE	2013
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	CHARLES R. GOODMAN	2013

Huron	DAVID L. CLABUESCH	2013
Ingham	R. GEORGE ECONOMY	2013
Ingham	RICHARD JOSEPH GARCIA	2009
Ionia	ROBERT SYKES, JR.	2013
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2013
Isabella	WILLIAM T. ERVIN	2013
Jackson	DIANE M. RAPPLEYE	2013
Kalamazoo	CURTIS J. BELL, JR.	2013
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2013
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2013
Kent	G. PATRICK HILLARY	2013
Kent	DAVID M. MURKOWSKI	2009
Keweenaw	JAMES G. JAASKELAINEN	2013
Lake	MARK S. WICKENS	2013
Lapeer	JUSTUS C. SCOTT	2013
Leelanau	JOSEPH E. DEEGAN	2013
Lenawee	MARGARET MURRAY-SCHOLZ NOE	2013
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2013
Macomb	KATHRYN A. GEORGE	2009
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2013
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	LaVAIL E. HULL	2013
Menominee	WILLIAM A. HUPY	2013
Midland	DORENE S. ALLEN	2013
Missaukee	CHARLES R. PARSONS	2013
Monroe	JOHN A. HOHMAN, JR.	2013
Monroe	PAMELA A. MOSKWA	2009
Montcalm	CHARLES W. SIMON, III	2013
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2013
Newaygo	GRAYDON W. DIMKOFF	2013
Oakland	BARRY M. GRANT	2009
Oakland	LINDA S. HALLMARK	2013
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	BRADLEY G. LAMBRIX	2013
Ogemaw	SHANA A. LAMBOURN	2013

Ontonagon	JOSEPH D. ZELEZNIK	2013
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. McGRAW	2013
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN TOMLINSON	2013
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2013
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	DARLENE A. O'BRIEN	2013
Wayne	JUNE E. BLACKWELL-HATCHER	2013
Wayne	FREDDIE G. BURTON, JR.	2013
Wayne	JUDY A. HARTSFIELD	2009
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2009
Wayne	DAVID J. SZYMANSKI	2009
Wayne	FRANK S. SZYMANSKI	2013
Wexford	KENNETH L. TACOMA	2013

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Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie.	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing.	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant.	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
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ADMINISTRATIVE ORDER
No. 2004-7

Adopted November 25, 2008, effective March 1, 2009 (File No. 2004-04)—REPORTER.

Administrative Order No. 2003-1 and MCL 600.401 *et seq*. authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of the Michigan Supreme Court. Effective May 1, 2005, the Supreme Court approved adoption of concurrent jurisdiction plans between the Third Judicial Circuit Court and the 19th District Court, the Third Judicial Circuit Court and the 29th District Court, and the Third Judicial Circuit Court and the 35th District Court. The Third Judicial Circuit Court and the 34th District Court have recently submitted a request for approval of a plan that would allow the 34th District Court to participate in the same concurrent jurisdiction program that was approved in Administrative Order No. 2004-7.

The Court hereby approves adoption of the following concurrent jurisdiction plans effective May 1, 2005 (between the Third Judicial Circuit Court and the 19th District Court, the Third Judicial Circuit Court and the 29th District Court, and the Third Judicial Circuit Court and the 35th District Court) and effective March 1, 2009 (between the Third Judicial Circuit Court and the 34th District Court):

Third Judicial Circuit Court ~~of Wayne County~~ and the 19th District Court

Third Judicial Circuit Court ~~of Wayne County~~ and the 29th District Court

Third Judicial Circuit Court ~~of Wayne County~~ and the 35th District Court

Third Judicial Circuit Court and the 34th District Court

The plans shall remain on file with the State Court Administrator.

Amendments of concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

ADMINISTRATIVE ORDER
No. 2008-2

ADOPTION OF A PILOT PROJECT TO STUDY THE EFFECTS OF THE JURY REFORM PROPOSAL

Entered July 11, 2008 (File No. 2005-19)—REPORTER.

On order of the Court, the judges listed below are authorized to implement a pilot project to study the effects of the jury-reform proposal that was published for comment by this Court in an order that entered July 11, 2006. The purposes of the pilot project are to determine whether, and in what way, the proposed jury-reform amendments support the goal of meaningful juror participation, and lead to greater confidence in the validity of the specific verdict and the overall jury system. In addition, the Court is interested in the effects of the proposed rules on court efficiency and the opinions of the attorneys and jurors who will operate under them. Courts that participate in the pilot project will operate under the following rules for the period of the pilot project, which will continue through December 31, 2010, or as otherwise ordered by the Court. At the Court's request, the participating courts will update the Court on the pilot program's status, and the judges' perceptions of the program's success. The Court anticipates that the pilot courts will apply these rules to the greatest extent possible as a way to test and assess all of the proposed ideas. The pilot project's success will be measured by the Court's evaluation of surveys that

have been completed by the courts to determine the jurors', judges', and attorneys' responses to the various procedures being tested.

Participant judges include the following:

The Honorable Wendy L. Potts (6th Circuit Court)

The Honorable David Viviano (16th Circuit Court)

The Honorable Timothy G. Hicks (14th Circuit Court)

The Honorable Kenneth W. Schmidt and the Honorable William J. Caprathe (18th Circuit Court)

The Honorable Richard J. Celello (41st Circuit Court)

The Honorable Paul E. Stutesman (45th Circuit Court)

The Honorable Beth Gibson (92nd District Court)

The Honorable Peter J. Wadel (79th District Court)

The Honorable Donald L. Sanderson (2B District Court)

The Honorable Thomas P. Boyd (55th District Court)

The Honorable Richard W. May (90th District Court)

RULE 2.512 INSTRUCTIONS TO JURY ~~RENDERING VERDICT~~

~~(A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict. The parties may stipulate in writing or on the record that~~

~~(1) the jury will consist of any number less than 6,~~

~~(2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or~~

~~(3) if more than six jurors were impaneled, all of the jurors may deliberate.~~

~~Except as provided in MCR 5.740(C), in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.~~

~~(B) Return; Poll.~~

~~(1) The jury must return its verdict in open court.~~

~~(2) A party may require a poll to be taken by the court asking each juror if it is his or her verdict.~~

~~(3) If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation; otherwise the verdict is complete, and the court shall discharge the jury.~~

~~(C) Discharge From Action; New Jury. The court may discharge a jury from the action:~~

~~(1) because of an accident or calamity requiring it;~~

~~(2) by consent of all the parties;~~

~~(3) whenever an adjournment or mistrial is declared;~~

~~(4) whenever the jurors have deliberated until it appears that they cannot agree.~~

~~The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury discharged.~~

~~(D) Responsibility of Officers.~~

~~(1) All court officers, including trial attorneys, must attend during the trial of an action until the verdict of the jury is announced.~~

~~(2) A trial attorney may, on request, be released by the court from further attendance, or the attorney may designate an associate or other attorney to act for him or her during the deliberations of the jury.~~

(A) Request for Instructions.

(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.

(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.

(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.

(B) Instructing the Jury.

(1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.

(2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the

party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

(D) Model Civil Jury Instructions.

(1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI) and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or repealing an instruction, the committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model civil jury instruction does not have the force and effect of a court rule.

(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

(3) Whenever the committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that

(a) the instruction is necessary to state the applicable law accurately, and

(b) the matter is not adequately covered by other pertinent model civil jury instructions.

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.

RULE 2.513 CONDUCT OF JURY TRIAL~~VIEW~~

(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions. ~~By Jury. On motion of either party or on its own initiative, the court may order an officer to take the jury as a whole to view property or a place where a material event occurred. During the view, no person other than the officer designated by the court may speak to the jury concerning a subject connected with the trial. The court may order the party requesting a jury view to pay the expenses of the view.~~

(B) Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take

appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record. ~~By Court. On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred.~~

(C) Opening Statements. Unless the parties and the court agree otherwise, the plaintiff or the prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts the plaintiff or the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements.

(D) Interim Commentary. Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial.

(E) Reference Documents. The court must encourage counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, witness lists, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other appropriate information to assist jurors in their deliberations.

(F) Deposition Summaries. Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read.

(G) Scheduling Expert Testimony. The court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

(1) Scheduling the presentation of the parties' expert witnesses sequentially; or

(2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination; or

(3) providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or the trial judge, would allow the experts to question each other.

(H) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

(I) Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

(J) Jury View. On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no person, other than an officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion.

(K) Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

(L) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The plaintiff or the prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the plaintiff or the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

(M) Comment on the Evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.

(N) Final Instructions to the Jury.

(1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

(2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate

response. The court may, in its discretion, provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations.

(3) Copies of Final Instructions. The court shall provide each juror with a written copy of the final jury instructions to take into the jury room for deliberation. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

(4) Clarifying or Amplifying Final Instructions. When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions.

(O) Materials in the Jury Room. The court shall permit the jurors, on retiring to deliberate, to take into the jury room their notes and final instructions. The court may permit the jurors to take into the jury room the reference document, if one has been prepared, as well as any exhibits and writings admitted into evidence.

(P) Provide Testimony or Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence that has not been allowed into the jury room under subrule (O), the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration. The court may order the jury to deliberate further without the requested review, as long as the

possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

RULE 2.514 RENDERING VERDICT~~SPECIAL VERDICTS~~

~~(A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:~~

~~(1) written questions that may be answered categorically and briefly;~~

~~(2) written forms of the several special findings that might properly be made under the pleadings and evidence; or~~

~~(3) the issues by another method, and require the written findings it deems most appropriate.~~

~~The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue.~~

~~(B) Judgment. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings.~~

~~(C) Failure to Submit Question; Waiver; Findings by Court. If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless before the jury retires the party demands its submission to the jury. The court may make a finding as to an issue omitted without a demand; or, if the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.~~

(A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict. The parties may stipulate in writing or on the record that

(1) the jury will consist of any number less than 6,

(2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or

(3) if more than 6 jurors were impaneled, all the jurors may deliberate.

Except as provided in MCR 5.740(C), in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.

(B) Return; Poll.

(1) The jury must return its verdict in open court.

(2) A party may require a poll to be taken by the court asking each juror if it is his or her verdict.

(3) If the number of jurors agreeing is less than required, the jury must be sent back for further deliberation; otherwise, the verdict is complete, and the court shall discharge the jury.

(C) Discharge From Action; New Jury. The court may discharge a jury from the action:

(1) because of an accident or calamity requiring it;

(2) by consent of all the parties;

(3) whenever an adjournment or mistrial is declared;

(4) whenever the jurors have deliberated and it appears that they cannot agree.

The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury that was discharged.

(D) Responsibility of Officers.

(1) All court officers, including trial attorneys, must attend during the trial of an action until the verdict of the jury is announced.

(2) A trial attorney may, on request, be released by the court from further attendance, or the attorney may designate an associate or other attorney to act for him or her during the deliberations of the jury.

RULE 2.515 SPECIAL VERDICTS~~MOTION FOR DIRECTED VERDICT~~

~~A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.~~

(A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:

(1) written questions that may be answered categorically and briefly;

(2) written forms of the several special findings that might properly be made under the pleadings and evidence; or

(3) the issues by another method, and require the written findings it deems most appropriate.

The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue.

(B) Judgment. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings.

(C) Failure to Submit Question; Waiver; Findings by Court. If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless the party demands its submission to the jury before it retires for deliberations. The court may make a finding with respect to an issue omitted without a demand. If the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.

RULE 2.516 MOTION FOR DIRECTED VERDICT~~INSTRUCTIONS TO JURY~~

~~(A) Request for Instructions.~~

~~(1)At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.~~

~~(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case as to each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact which are supported by the evidence. The theory may include those claims supported by the evidence or admitted.~~

~~(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.~~

~~(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.~~

~~(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.~~

~~(B) Instructing the Jury.~~

~~(1) After the jury is sworn and before evidence is taken, the court shall give such preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. MCR 2.516(D)(2) does not apply to such preliminary instructions.~~

~~(2) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict.~~

~~(3) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case. The court, at its discretion, may also comment on the evidence, the testimony, and the character of the witnesses as the interests of justice require.~~

~~(4) While the jury is deliberating, the court may further instruct the jury in the presence of or after reasonable notice to the parties.~~

~~(5) Either on the request of a party or on the court's own motion, the court may provide the jury with~~

~~(a) a full set of written instructions,~~

~~(b) a full set of electronically recorded instructions, or~~

~~(c) a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided.~~

~~If it does so, the court must ensure that such instructions are made a part of the record.~~

~~(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.~~

~~(D) Model Civil Jury Instructions.~~

~~(1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI) and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or repealing an instruction, the committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model civil jury instruction does not have the force and effect of a court rule.~~

~~(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if~~

~~(a) they are applicable,~~

~~(b) they accurately state the applicable law, and~~

~~(c) they are requested by a party~~

~~(3) Whenever the committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that~~

~~(a) the instruction is necessary to state the applicable law accurately, and~~

~~(b) the matter is not adequately covered by other pertinent model civil jury instructions.~~

~~(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.~~

A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.

~~RULE 6.414. CONDUCT OF JURY TRIAL~~

~~(A) Before trial begins, the court should give the jury appropriate pretrial instructions.~~

~~(B) Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.~~

~~(C) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable time limits on the opening statements.~~

~~(D) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes and they should not permit note taking to interfere with their attentiveness. The court also must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall~~

~~ensure that all juror notes are collected and destroyed when the trial is concluded.~~

~~(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.~~

~~(F) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, as permitted by the trial judge, the officer in charge of the jurors, or any person appointed by the court to direct the jurors' attention to a particular place or site, and the trial judge, may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion.~~

~~(G) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.~~

~~(H) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may~~

~~instruct the jury before the parties make closing arguments, and give any appropriate further instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate.~~

~~(I) Materials in the Jury Room. The court may permit the jury, on retiring to deliberate, to take into the jury room a writing, other than the charging document, setting forth the elements of the charges against the defendant and any exhibits and writings admitted into evidence. On the request of a party or on its own initiative, the court may provide the jury with a full set of written instructions, a full set of electronically recorded instructions, or a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record.~~

~~(J) Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.~~

KELLY, J. I oppose the implementation of the pilot project. I am particularly concerned with MCR 2.513(G), 2.513(K), and 2.513(M). These court-rule changes represent a radical departure from current practices and are unwise, even in the form of a pilot project.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted September 30, 2008, effective January 1, 2009 (File No. 2006-09)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.202 of the Michigan Court Rules is adopted, effective January 1, 2009.

[The present language would be amended as indicated below:]

RULE 7.202 DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,

(ii) an order designated as final under MCR 2.604(B),

(iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,

(v) ~~A~~an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity;

(b) [Unchanged.]

Staff Comment: This amendment clarifies that motions for summary disposition that involve claims of governmental immunity based on MCR 2.116(C)(7) and (C)(10) that are denied are appealable by right in the Court of Appeals. This language addresses the jurisdictional issue that arose in the cases of *Newton v Michigan State Police*, 263 Mich App 251 (2004), and *Walsh v Taylor*, 263 Mich App 618 (2004).

The staff comment is not an authoritative construction by the Court.

Adopted September 30, 2008, effective January 1, 2009 (File No. 2007-28)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

On order of the Court, notice of the proposed amendment of Rule 3.901 and new Rule 3.930 of the Michigan Court Rules and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.901 and new Rule 3.930 of the Michigan Court Rules are adopted, effective January 1, 2009.

[The present language would be amended as indicated below:]

RULE 3.901 APPLICABILITY OF RULES.

(A) [Unchanged.]

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901-~~3.928~~3.930, 3.980, and 3.911-3.933 apply to delinquency proceedings and child protective proceedings;

(2)–(5) [Unchanged.]

RULE 3.930 RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS IN JUVENILE PROCEEDINGS.

(A) Receipt of Exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by the Michigan Supreme Court Case File Management Standards.

(B) Return or Disposal of Exhibits. At the conclusion of a trial or hearing, exhibits may be retrieved by the parties who submitted them except that any weapons and drugs shall be returned to the confiscating agency for proper disposition. If the exhibits are not retrieved by the parties within 56 days after conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties.

(C) Confidentiality. If the court retains an exhibit after a hearing or trial and the exhibit is confidential as provided by MCR 3.903(A)(3), the court must continue to maintain the exhibit in a confidential manner.

Staff Comment: These amendments allow the court to return or destroy exhibits within 56 days of the completion of the trial or hearing in a juvenile proceeding. In addition, the court must maintain confidential documents that are admitted as exhibits in accordance with MCR 3.903(A)(3).

The staff comment is not an authoritative construction by the Court.

Adopted September 30, 2008, effective January 1, 2009 (File No. 2007-30)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.107 of the Michigan Court Rules is adopted, effective January 1, 2009.

[The present language would be amended as indicated below:]

RULE 2.107 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A)-(B) [Unchanged.]

(C) Manner of Service. Service of a copy of a paper on an attorney must be made by delivery or by mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1) Delivery to Attorney. Delivery of a copy to an attorney within this rule means

(a) handing it to the attorney personally, or, if agreed to by the parties, e-mailing it to the attorney as allowed under MCR 2.107(C)(4);

(b) leaving it at the attorney's office with the person in charge or, if no one is in charge or present, by leaving it in a conspicuous place; or

(c) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there.

(2) Delivery to Party. Delivery of a copy to a party within this rule means

(a) handing it to the party personally, or, if agreed to by the parties, e-mailing it to the party as allowed under MCR 2.107(C)(4); or

(b) leaving it at the party's usual residence with some person of suitable age and discretion residing there.

(3) Mailing. Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing.

(4) E-mail. Some or all of the parties may agree to e-mail service among themselves by ~~e-mail by~~ filing a stipulation in that case. Some or all of the parties may agree to e-mail service by a court by filing an agreement with that court to do so. E-mail service shall be subject to the following conditions:

(a) The stipulation or agreement for service by e-mail shall set forth the e-mail addresses of the parties or attorneys that agree to e-mail service, which shall include the same e-mail address currently on file with the State Bar of Michigan. If an attorney is not a member of the State Bar of Michigan, the e-mail address shall be the e-mail address currently on file with the appropriate registering agency in the state of the attorney's admission. Parties and attorneys who have stipulated or agreed to service by e-mail under this subsection shall immediately notify all other parties and the court if the party's or attorney's e-mail address changes.

(b) The parties shall set forth in the stipulation or agreement all limitations and conditions concerning e-mail service, including but not limited to:

(i) the maximum size of the document that may be attached to an e-mail;

(ii) designation of exhibits as separate documents;

(iii) the obligation (if any) to furnish paper copies of e-mailed documents; and

(iv) the names and e-mail addresses of other individuals in the office of an attorney of record designated to receive e-mail service on behalf of a party.

(c) Documents served by e-mail must be in PDF format or other format that prevents the alteration of the document contents.

(d) A paper served by e-mail that an attorney is required to sign may include the attorney's actual signature or a signature block with the name of the signatory accompanied by "s/" or "/s/." That designation shall constitute a signature for all purposes, including those contemplated by MCR 2.114(C) and (D).

(e) Each e-mail that transmits a document shall include a subject line that identifies the case by court, party name, case number, and the title or legal description of the document(s) being sent.

(f) An e-mail transmission sent after 4:30 p.m. Eastern Time shall be deemed to be served on the next day that is not a Saturday, Sunday, or legal holiday. Service by e-mail under this subrule is treated as service by delivery under MCR 2.107(C)(1).

(g) A party may withdraw from a stipulation or agreement for service by e-mail if that party notifies the other party or parties and the court in writing at least 28 days in advance of the withdrawal.

(h) Service by e-mail is complete upon transmission, unless the party making service learns that the attempted service did not reach the e-mail address of the intended recipient. If an e-mail is returned as undeliverable, the party, attorney, or court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the e-mail was undeliverable. A party, attorney, or court must also retain a notice that the e-mail was returned as undeliverable.

(i) The e-mail sender shall maintain an archived record of sent items that shall not be purged until the conclusion of the case, including the disposition of all appeals.

Staff Comment: The amendments allow parties or attorneys to voluntarily agree to receive notices and other documents from the court by e-mail, similar to the current ability of parties to stipulate to serve one another by e-mail.

The staff comment is not an authoritative construction by the Court.

Adopted September 30, 2008, effective January 1, 2009 (File No. 2008-22)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.903 and 3.920 of the Michigan Court Rules are adopted, effective January 1, 2009.

[The present language would be amended as indicated below:]

RULE 3.903 DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(2) [Unchanged.]

(3) "Confidential file" means

(a) [Unchanged.]

(b) the contents of a social file maintained by the court, including materials such as

(i)-(iii) [Unchanged.]

(iv) ~~Family Independence Agency~~Department of Human Services records;

(v) [Unchanged.]

(vi) victim statements.;

(vii) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver.

(4)-(26) [Unchanged.]

(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1)-(3) [Unchanged.]

(4) "Foster care" means 24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the ~~Family Independence Agency~~Department of Human Services placement and care responsibility, including, but not limited to,

(a)-(b) [Unchanged.]

(5)-(10) [Unchanged.]

(D) Designated Proceedings.

(1)-(7) [Unchanged.]

(8) "Specified juvenile violation" means any offense, attempted offense, conspiracy to commit an offense, or solicitation to commit an offense, as enumerated in MCL 712A.2d, that would constitute:

(a)-(o) [Unchanged.]

(p) escape or attempted escape from a medium-security or high-security facility operated by the ~~Family Independence Agency~~Department of Human Services or a high-security facility operated by a private agency under contract with the ~~Family Independence Agency~~Department of Human Services, MCL 750.186a;

(q)-(r) [Unchanged.]

(9) [Unchanged.]

(E) [Unchanged.]

RULE 3.920 SERVICE OF PROCESS.

(A)–(G) [Unchanged.]

(H) Proof of Service.

(1)–(3) [Unchanged.]

(4) Content. The proof of service must identify the papers served. A proof of service for papers served on a foster parent, preadoptive parent, or relative caregiver shall be maintained in the confidential social file as identified in MCR 3.903(A)(3)(b)(vii).

(5) [Unchanged.]

Staff Comment: The amendments clarify that information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver is part of the confidential file and, therefore, a proof of service that includes identifying or location information regarding those parties must also be maintained in the confidential file. In addition, the amendments change references in the rule from Family Independence Agency to Department of Human Services.

The staff comment is not an authoritative construction by the Court.

Adopted October 14, 2008, effective immediately (File No. 2008-19)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

By order dated May 6, 2008, this Court adopted the amendment of Rule 3.928 of the Michigan Court Rules with immediate effect. Notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the amendment of Rule 3.928 of the Michigan Court Rules is retained.

Adopted December 16, 2008, effective January 1, 2009 (File No. 2007-24)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.302, 2.310, 2.313, 2.401, and 2.506 of the Michigan Court Rules are adopted, effective January 1, 2009.

[The present language would be amended as indicated below:]

RULE 2.302 GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

(B) Scope of Discovery.

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2)-(4) [Unchanged.]

(5) Electronically Stored Information. A party has the same obligation to preserve electronically stored information as it does for all other types of information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(6) Limitation of Discovery of Electronic Materials. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for the discovery.

(7) Information Inadvertently Produced. If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C)-(H) [Unchanged.]

RULE 2.310 REQUESTS FOR PRODUCTION OF DOCUMENTS AND OTHER THINGS; ENTRY ON LAND FOR INSPECTION AND OTHER PURPOSES.

(A)-(B) [Unchanged.]

(C) Request to Party.

(1) The request may, without leave of court, be served on the plaintiff after commencement of the action and on the defendant with or after the service of the summons and complaint on that defendant. The request must list the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts, as well as the form or forms in which electronically stored information is to be produced, subject to objection.

(2) The party on whom the request is served must serve a written response within 28 days after service of

the request, except that a defendant may serve a response within 42 days after being served with the summons and complaint. The court may allow a longer or shorter time. With respect to each item or category, the response must state that inspection and related activities will be permitted as requested or that the request is objected to, in which event the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified. If the request does not specify the form or forms in which electronically stored information is to be produced, the party responding to the request must produce the information in a form or forms in which the party ordinarily maintains it, or in a form or forms that is or are reasonably usable. A party producing electronically stored information need only produce the same information in one form.

(3)-(6) [Unchanged.]

(D) [Unchanged.]

RULE 2.313 FAILURE TO PROVIDE OR TO PERMIT DISCOVERY; SANCTIONS.

(A)-(D) [Unchanged.]

(E) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

RULE 2.401 PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS.

(A) [Unchanged.]

(B) Early Scheduling Conference and Order.

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. In

addition to those considerations enumerated in subrule (C)(1), during this conference the court should consider:

(a) whether jurisdiction and venue are proper or whether the case is frivolous,

(b) whether to refer the case to an alternative dispute resolution procedure under MCR 2.410, ~~and~~

(c) the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case~~.~~, and

(d) discovery, preservation, and claims of privilege of electronically stored information.

(2) Scheduling Order.

(a) At an early scheduling conference under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events the court deems appropriate, including

(i) the initiation or completion of an ADR process,

(ii) the amendment of pleadings, adding of parties, or filing of motions,

(iii) the completion of discovery,

(iv) the exchange of witness lists under subrule (I), and

(v) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) The scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including

experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.

(c) The scheduling order also may include provisions concerning discovery of electronically stored information, any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production, preserving discoverable information, and the form in which electronically stored information shall be produced.

~~(c)~~(d) Whenever reasonably practical, the scheduling of events under this subrule shall be made after meaningful consultation with all counsel of record.

(i) If a scheduling order is entered under this subrule in a manner that does not permit meaningful advance consultation with counsel, within 14 days after entry of the order, a party may file and serve a written request for amendment of the order detailing the reasons why the order should be amended.

(ii) Upon receiving such a written request, the court shall reconsider the order in light of the objections raised by the parties. Whether the reconsideration occurs at a conference or in some other manner, the court must either enter a new scheduling order or notify the parties in writing that the court declines to amend the order. The court must schedule a conference, enter the new order, or send the written notice, within 14 days after receiving the request.

(iii) The submission of a request pursuant to this subrule, or the failure to submit such a request, does not preclude a party from filing a motion to modify a scheduling order.

(C)-(I) [Unchanged.]

RULE 2.506 SUBPOENA; ORDER TO ATTEND.

(A) Attendance of Party or Witness.

(1) The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and to produce notes, records, documents, photographs, or other portable tangible things as specified.

(2) A subpoena may specify the form or forms in which electronically stored information is to be produced, subject to objection. If the subpoena does not so specify, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. A person producing electronically stored information need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. In a hearing or submission under subrule (H), the person responding to the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for such discovery.

~~(2)~~(4) The court may require a party and a representative of an insurance carrier for a party with information and authority adequate for responsible and effective participation in settlement discussions to be present or immediately available at trial.

~~(3)~~(5) A subpoena may be issued only in accordance with this rule or MCR 2.305, 2.621(C), 9.112(D), 9.115(I)(1), or 9.212.

(B)-(I) [Unchanged.]

Staff Comment: These amendments update Michigan's discovery rules as they relate to electronically stored information. The provisions of the proposal at MCR 2.302(B)(6) and MCR 2.506(A)(3) allow the court to shift the cost of discovery to the requesting party if discovery is requested from sources that are not reasonably accessible, and prohibit sanctions if information is lost or destroyed as a result of a good-faith, routine record destruction policy or "litigation hold" procedures. The "safe harbor" provision provided in MCR 2.302(B)(5) and in MCR 2.313 applies when information is lost or destroyed under a routine electronic information system, if the operation of the system was performed in good faith. Good faith may be shown by a party's actions to attempt to preserve information as part of a "litigation hold" that would otherwise have been lost or destroyed under an electronic information system.

The new language of MCR 2.302 and MCR 2.506 also allows parties to determine the format in which the information should be produced, and how to handle a situation in which protected information is inadvertently produced.

The staff comment is not an authoritative construction by the Court.

AMENDMENT OF THE RULES FOR THE BOARD OF LAW EXAMINERS

Adopted September September 30, 2008, effective immediately (File No. 2008-20)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6 of the Rules for the Board of Law Examiners is adopted, effective immediately.

[The present language would be amended as indicated below:]

RULE 6. FEES.

The fees are: an application for examination, $340 ~~$300~~ and an additional fee for the late filing of an application or transfer of an application for examination, $100; an application for reexamination~~re-examination~~, $240 ~~$200~~; an application for recertification, $200; an application for admission without examination, $600 plus the requisite fee for the National Conference of Bar Examiners' report. Checks must be payable to the State of Michigan.

Staff Comment: The amendment of Rule 6 of the Rules for the Board of Law Examiners increases the fees for application for the bar examination from $300 to $340, and for reexamination from $200 to $240. The increase in fees allows for the implementation of the change in policy regarding grading Michigan bar examinations that is reflected in the attached notice.

The staff comment is not an authoritative construction by the Court.

See notice from Board of Law Examiners: Notice Regarding Changes to the Method of Scoring the Michigan Bar Examination.

* * *

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NOTICE REGARDING CHANGES TO THE METHOD OF SCORING THE MICHIGAN BAR EXAMINATION

In order to assure consistency in the level of difficulty of Michigan bar examination essay questions from one examination to another, and thereby to more accurately assess whether applicants have attained the level of competence in the law necessary for the protection of the public, the Board of Law Examiners has determined to scale the essay examination scores to the scoring of the Multistate Bar Examination. To do this, the Board has determined that it is necessary to eliminate the practice of not grading the essay answers of applicants obtaining a threshold score on the MBE. This change will conform Michigan's practices to those of 43 of the other 52 jurisdictions currently administering the MBE. Moreover, it is the view of the Board that this change will also more accurately gauge whether applicants have attained the level of specific competence in Michigan law necessary for the protection of the public.

Therefore, effective with the administration of the February 2009 Michigan bar examination, all essay answers will be graded and no applicant will pass the examination solely on the basis of the applicant's MBE score. The combined passing score will remain at 135, determined by the formula currently being employed.

SUPREME COURT CASES

PONTIAC FIRE FIGHTERS UNION LOCAL 376 v CITY OF PONTIAC

Docket No. 132916. Argued November 7, 2007 (Calendar No. 6). Decided July 23, 2008.

The Pontiac Fire Fighters Union Local 376 brought an action in the Oakland Circuit Court to enjoin the city of Pontiac from implementing its proposed plan to lay off 28 firefighters until the plaintiff's unfair labor practice charge against the city was resolved. After a show-cause hearing, the court, John J. McDonald, J., granted a preliminary injunction. The defendant appealed. In a split decision, the Court of Appeals, COOPER, P.J., and SMOLENSKI, J., held that the trial court did not abuse its discretion by granting the injunction and did not err by finding that the plaintiff demonstrated a likelihood of success on the merits and that there was a real and imminent danger of irreparable harm. HOEKSTRA, J., dissenting, would have held that the trial court abused its discretion because the plaintiff did not meet its burden of demonstrating irreparable harm because the record did not support the conclusion that the layoffs would jeopardize firefighter safety, and further noted that injunctive relief is inappropriate to remedy economic injuries. Unpublished opinion of the Court of Appeals, issued November 30, 2006 (Docket No. 271497). The defendant applied for leave to appeal, which the Supreme Court granted. 478 Mich 903 (2007).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN, the Supreme Court *held*:

The circuit court abused its discretion by granting injunctive relief. The plaintiff failed to meet its burden of establishing that irreparable harm without an adequate remedy at law would result if the injunction did not issue, and even if the plaintiff had satisfied its initial burden, it failed to carry its burden in light of the defendant's contrary proffered evidence relating to staffing and safety protocols.

1. The circuit court erred by basing its decision to grant injunctive relief on its belief that the layoffs would inflict financial hardship on the laid-off firefighters. This alleged injury is not irreparable and not a proper subject of injunctive relief because it can be adequately remedied by damages at law.

2. A mere apprehension of reduced safety by the plaintiff is insufficient grounds for a court to grant equitable relief. The plaintiff bears the responsibility of submitting sufficiently persuasive evidence that particular, irreparable harm will result if an injunction does not issue. In this case, the plaintiff did not establish that the firefighters remaining after the proposed layoffs would face real and imminent danger resulting from the layoffs, and the defendant submitted contrary evidence relating to staffing and safety protocols that specifically refuted the plaintiff's allegations.

Reversed; preliminary injunction vacated.

Justice KELLY, joined by Justices CAVANAGH and WEAVER, dissenting, would hold that the circuit court did not abuse its discretion to the extent that it granted injunctive relief on the basis of the plaintiff's unrebutted allegation that the proposed layoffs would result in longer response times to fires and, therefore, more dangerous fires for the remaining firefighters.

1. INJUNCTIONS — FIREFIGHTERS — LABOR RELATIONS — PROPOSED LAYOFFS — FINANCIAL HARDSHIP.

Financial hardship to firefighters is not a proper basis for granting injunctive relief against a proposed layoff of firefighters because the harm is not irreparable and can be adequately remedied by damages at law.

2. INJUNCTIONS — FIREFIGHTERS — LABOR RELATIONS — PROPOSED LAYOFFS — SAFETY.

A mere apprehension that a proposed reduction in firefighting staff will result in reduced safety for those remaining is insufficient grounds for a court to grant injunctive relief; a plaintiff must make a particularized showing that there exists a real and imminent danger of irreparable harm if an injunction does not issue.

Gregory, Moore, Jeakle, Heinen & Brooks, P.C. (by *Gordon A. Gregory* and *Emilie D. Rothgery*), for the Pontiac Fire Fighters Union Local 376.

Keller Thoma, P.C. (by *Bruce M. Bagdady* and *Jonathon A. Rabin*), for the city of Pontiac.

Amici Curiae:

Dykema Gossett PLLC (by *John A. Entenman*, *Melvin J. Muskovitz*, and *F. Arthur Jones II*) for the Michigan Municipal League and the Michigan Association of Counties.

Woodley & McGillivary (by *Thomas A. Woodley* and *Bryan G. Polisuk*) for the International Association of Fire Fighters and the Michigan Professional Fire Fighters Union.

Sachs Waldman, Professional Corporation (by *Mary Ellen Gurewitz*), for the Michigan State AFL-CIO.

YOUNG, J. The issue in this case is whether the circuit court abused its discretion when it issued a preliminary injunction preventing defendant city of Pontiac from implementing its plan to reduce a budget shortfall by laying off members of plaintiff Pontiac Fire Fighters Union Local 376. We hold that the circuit court abused its discretion. Plaintiff failed to meet its burden of establishing that irreparable harm would result if the injunction did not issue, and even supposing plaintiff satisfied its initial burden, it failed to carry its burden in light of defendant's contrary proffered evidence. Accordingly, we reverse the Court of Appeals and vacate the circuit court order granting the preliminary injunction.

FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant are parties to a collective bargaining agreement (CBA) that was in effect from June 1, 2002, to June 30, 2004. Although the parties did not agree to a new CBA when that agreement expired, the existing agreement continued to govern the parties' relationship after June 30, 2004, because under its own terms the agreement was automatically extended until a new contract was negotiated or ordered.[1]

[1] Article VII, Section 12 of the CBA provided: "This Agreement shall remain in full force and effect from July 1, 2002 through June 30, 2004, and it shall be extended automatically thereafter on a daily basis until a new contract is negotiated or ordered."

In 2005 and 2006, defendant faced serious budget shortfalls that it sought to address in part by laying off 28 firefighters. Plaintiff maintained that the layoff plan and the manner in which defendant intended to implement it violated the terms of the CBA[2] and constituted an unfair labor practice.

On June 16, 2006, plaintiff filed a verified complaint in the Oakland Circuit Court seeking a preliminary injunction against defendant's proposed layoffs pending the resolution of an unfair labor practice charge, collective bargaining, or interest arbitration.[3] Several days earlier, plaintiff had filed an unfair labor practice charge against defendant with the Michigan Employment Relations Commission (MERC). The verified complaint alleged that the proposed layoffs would necessitate a dramatic reorganization of the fire department and that this reorganization threatened firefighter safety. Specifically, plaintiff alleged that the layoffs would increase response time to a fire emergency, which would allegedly allow fires to escalate, making them more difficult and more dangerous to extinguish. Moreover, plaintiff claimed that this problem would be compounded by the smaller number of firefighters present at the scene of a fire.

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[2] Plaintiff relied on Article IX, Section 7.D.4 of the CBA, which provided in pertinent part that "[d]uring the duration of the Agreement, there will be no layoff of bargaining unit personnel . . . ." Defendant relied on other portions of the CBA that seemed to presume that defendant could lay off union members. For instance, Article IX, Section 9 set forth advance notice requirements for layoffs such as "[i]f workers are to be laid off, a fourteen (14) day notice shall be given of the date when their services shall no longer be required."

[3] The complaint alleged four counts: (1) breach of the CBA; (2) unfair labor practice for failure to bargain under the public employment relations act (PERA); (3) city charter violation; and (4) health and safety violation.

The circuit court ordered defendant to show cause why the injunction should not be granted. On June 28, 2006, the court conducted a hearing on the preliminary injunction. However, the court took no witness testimony at the hearing. Plaintiff relied on the assertions in its verified complaint, and defendant submitted several affidavits to counter plaintiff's allegations. One affidavit particularly pertinent to this case was submitted by the chief of the Pontiac Fire Department, Wilburt McAdams.

In his affidavit, McAdams addressed many of plaintiff's allegations that the proposed layoffs threatened firefighter safety. The affidavit noted that the "great majority" of calls received by the fire department are medical runs rather than fire runs. McAdams contended that minimum staffing levels would be maintained at all times and that in the event staffing reached critically low levels, firefighters would only respond to fires and not medical runs, which would be handled by private ambulance services.

McAdams further averred that firefighter safety at the site of a fire would not be jeopardized by the layoffs. The department's remaining 89 firefighters would continue to adhere to basic safety protocols such as the "incident command system"[4] and the "two in, two out" rule.[5] Moreover, the affidavit asserted that the number of firefighters at the scene of a fire would be unaffected. McAdams claimed that the number of firefighters on each rig would actually increase from three or four to four firefighters. Finally, McAdams averred that the fire

[4] According to the affidavit, the incident command system prohibits a firefighter from entering a burning structure unless, after a careful assessment of the fire, an incident commander permits entry.

[5] According to the affidavit, under this rule, a firefighter cannot enter a structure that is on fire without being accompanied by another firefighter and two firefighters remain stationed outside the structure.

department would continue to follow all state and local workplace safety rules and regulations and it would continue to participate in mutual aid programs where nearby communities would lend their firefighters if assistance were required.

In a written opinion issued on June 30, 2006, the circuit court granted the preliminary injunction after ruling that plaintiff satisfied the four traditional elements for injunctive relief.[6] The court found that both the laid-off firefighters and those who would remain faced a threat of significant, irreparable harm in the absence of injunctive relief. With respect to the laid-off firefighters, the court found that they would "los[e] their jobs, salary and benefits and create a current hardship that cannot be compensated even if a subsequent arbitration decision would award those laid off a reinstatement of their positions and back wages." As to the remaining firefighters, the court found that they

> may be irreparably harmed since a reduction in the workforce and the closing of several City fire stations would result in a significant increased risk of harm for the remaining firefighters. Fewer firefighters would be available to respond to fires and the closing of stations caused by the [layoff] would result in the firefighters having to cover

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[6] In *Michigan Coalition of State Employees Unions v Civil Service Comm*, 465 Mich 212, 225 n 11; 634 NW2d 692 (2001), this Court noted that besides the demonstration of irreparable harm, the three additional factors in a preliminary injunction analysis are (1) whether harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (2) the strength of the moving party's showing that it is likely to prevail on the merits, and (3) harm to the public interest if an injunction is issued.

With respect to these three remaining factors, the circuit court in the present case concluded (1) that the balance of harm favored plaintiff notwithstanding defendant's financial difficulties, (2) that plaintiff demonstrated a substantial likelihood of success on the merits, and (3) that the public faced less harm if the injunction issued than if it did not.

> a larger territory. The remaining firefighters would thus not be able to respond as quickly as they used to[,] which means that they would be faced with fires that have increased in intensity or size and as a result are more dangerous.

Defendant appealed the circuit court's order to the Court of Appeals, which upheld the preliminary injunction in a split, unpublished decision.[7] The majority held that the trial court did not abuse its discretion when it granted the injunction, particularly its findings that plaintiff would suffer irreparable harm and that plaintiff demonstrated a likelihood of success on the merits. The dissenting member of the panel argued that the trial court abused its discretion because plaintiff did not meet its burden of demonstrating irreparable harm. With respect to the laid-off firefighters, the dissent noted that injunctive relief was inappropriate to remedy economic injuries. With respect to the remaining firefighters, the dissent observed that in view of defendant's proffered evidence that the layoffs would not jeopardize firefighter safety, the record did not support the trial court's conclusion to the contrary.

Defendant filed an application with this Court seeking leave to appeal, which we granted.[8]

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[7] *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, unpublished opinion per curiam of the Court of Appeals, issued November 30, 2006 (Docket No. 271497).

[8] 478 Mich 903 (2007). The grant order asked the parties to address

> (1) whether the circuit court had jurisdiction to grant a preliminary injunction with respect to the breach of contract claim (count I) and the unfair labor practice claim (count II), and (2) if the circuit court had jurisdiction: (a) whether it abused its discretion in issuing an injunction to prevent layoffs based on alleged irreparable harm to the laid-off employees; (b) whether the plaintiff presented sufficient evidence to support its claim of an increased risk of harm to the firefighters who would not be laid off;

STANDARD OF REVIEW

We review a trial court's decision to grant injunctive relief for an abuse of discretion.[9] We have recently offered the following articulation of the abuse of discretion standard. There are circumstances where a trial court must decide a matter and there will be no single correct outcome; rather, there may be more than one reasonable and principled outcome.[10] The trial court abuses its discretion when its decision falls outside this range of principled outcomes.[11]

ANALYSIS

The Court of Appeals has succinctly stated that " '[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.' "[12] In the context of labor disputes, this Court has observed that "it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace."[13] This Court

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and (c) whether the plaintiff is likely to prevail on its breach of contract and unfair labor practice claims.

With respect to the first question in our grant order, we agree with the parties that the trial court has jurisdiction to issue an injunction in aid of MERC's jurisdiction to decide unfair labor practice charges. MCL 423.216(h).

[9] *Michigan Coalition,* 465 Mich at 217.

[10] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[11] *Id*.

[12] *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998), quoting *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992).

[13] *Holland School Dist v Holland Ed Ass'n*, 380 Mich 314, 326; 157 NW2d 206 (1968).

recently reiterated the longstanding principle that "a particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction."[14] The mere apprehension of future injury or damage cannot be the basis for injunctive relief.[15] Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available.[16]

MCR 3.310 governs the procedure for issuing a preliminary injunction. According to MCR 3.310(A)(1), unless otherwise provided by statute or court rule, an injunction may not be granted without a hearing. At this hearing, "the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued . . . ."[17] If a court grants preliminary injunctive relief, a trial on the merits must be held within six months of the injunction issuing, except for good cause or a stipulation from the parties to extend the time.[18] Given the extraordinary nature of injunctive relief, our court rules contemplate expeditious resolution of the underlying claim or claims once a preliminary injunction issues.

With these general precepts in mind, we must consider whether the circuit court abused its discretion

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[14] *Michigan Coalition*, 465 Mich at 225-226.

[15] *Fenestra Inc v Gulf American Land Corp*, 377 Mich 565, 601-602; 141 NW2d 36 (1966); *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974) ("[I]t is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural."). See also *Royal Oak School Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) (injunctive relief inappropriate where there is no proof that the party would suffer irreparable injury).

[16] *Grand Rapids Electric R Co v Calhoun Circuit Judge*, 156 Mich 419, 422; 120 NW 1004 (1909).

[17] MCR 3.310(A)(4).

[18] MCR 3.310(A)(5).

when it granted plaintiff's motion for preliminary injunction. The first half of the circuit court's irreparable-harm analysis centered on its belief that the layoffs would inflict considerable financial hardship on the laid-off firefighters. We agree with the Court of Appeals dissent that this alleged injury is not irreparable and not the proper subject of injunctive relief. There exists an adequate legal remedy for laid-off firefighters. If the layoffs violated the CBA or constituted an unfair labor practice, MERC or a grievance arbitrator can award back pay, order reinstatement, or provide another remedy to make the laid-off firefighters whole.[19] Granting extraordinary equitable relief to remedy these economic injuries is unnecessary and inappropriate because they can be remedied by damages at law.[20]

In the second half of its irreparable-harm analysis, the circuit court found that the layoffs would deplete the number of available firefighters, which would increase the remaining firefighters' workload and lengthen their response time, which in turn would require firefighters to fight larger, more intense, and more dangerous fires. Thus, firefighter safety would be jeopardized. To support this chain of logic, the circuit court appeared to adopt without reservation plaintiff's factual assertions.

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[19] See, e.g., MCL 423.216(b).

[20] *Thermatool Corp v Borzym,* 227 Mich App 366, 377; 575 NW2d 334 (1998). Plaintiff relies on this Court's dictum in *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 168; 365 NW2d 93 (1984), that "[w]e do not hold that the absence of usable resources and of obtainable alternative sources of income with which to support one's self and one's dependents, coupled with the prospect of destitution, serious physical harm, or loss of irreplaceable treasured possessions, could never support a finding of irreparable injury in an appropriate case." We doubt whether the *Michigan State Employees Ass'n* Court was correct that this is an adequate basis to support a finding of irreparable injury, but, in any event, the record in this case does not support plaintiff's reliance on it.

However, while plaintiff's argument that staffing decisions might affect firefighter safety is appealing as a general proposition, upon closer scrutiny, plaintiff alleged nothing more than an apprehension of future injury or damage. Indeed, the circuit court could only speculate that the firefighters "may" have been irreparably harmed by the layoffs. Neither plaintiff nor the circuit court detailed how the remaining firefighters faced *real* and *imminent* danger from the layoffs rather than future, speculative harm. Under established principles governing injunctive relief, plaintiff's verified complaint, standing alone, failed to make a particularized showing of irreparable harm. Thus, plaintiff failed to carry its burden of proof from the outset.

In reaching this conclusion, we do not trivialize the dangers accompanying firefighting. However, because firefighting is a dangerous job, every managerial decision in the abstract might touch on a safety issue. A mere apprehension of reduced safety by the union is insufficient grounds for a court to grant equitable relief. Otherwise, the extraordinary nature of a preliminary injunction would be trivialized. Plaintiff bears the responsibility of submitting sufficiently persuasive evidence that particular, irreparable harm will result if an injunction does not issue.

Further, even if we assumed arguendo that plaintiff initially succeeded in demonstrating particularized, irreparable harm, it failed to carry its burden of proof in the face of contrary evidence submitted by defendant that specifically refuted plaintiff's allegations. For instance, in response to plaintiff's allegation that the number of firefighter personnel at a fire scene would be limited and reduced to unsafe levels, Fire Chief McAdams stated that the number of firefighters present at a fire would not be reduced by the layoffs and that the

number of firefighters in each rig would increase from three or four to four. And McAdams averred that additional, outside support was available, if needed. For instance, because the "great majority" of calls to which the fire department responded were medical runs, private ambulance services, rather than firefighters, would be used to respond to those calls if the department was functioning at its minimum daily staffing level. Thus, the firefighters would remain available to fight fires. Also, because the department participated in mutual aid programs with the fire departments of neighboring communities, additional firefighters from other communities could be called on for assistance. Moreover, safety protocols, such as the "two in, two out" rule and the incident command system, would remain in place at the scene of every fire. Defendant submitted evidence that it would maintain the same number of firefighters at the scene of a fire, would retain existing policies to protect the health and safety of firefighters, and would use outside resources to ensure that a minimally staffed fire department did not overburden firefighters with medical runs at the expense of fighting fires. Simply put, plaintiff's nonspecific allegations of irreparable harm were refuted by the more specific, sworn statements in Fire Chief McAdams's affidavit.

In the face of this conflicting evidence that blunted the force of plaintiff's safety allegations, it behooved plaintiff to do more than rely on its initial factual allegations. Plaintiff did not do so. Thus, for this additional reason, it failed to carry its burden of demonstrating irreparable harm under MCR 3.310(A).

We are not second-guessing the circuit court's discretion to substitute the outcome we prefer. For reasons that are unclear, the circuit court in its written opinion

granting the preliminary injunction seemed to credit only plaintiff's allegations and did not at all consider defendant's contrary evidence. Plaintiff failed to carry its burden of proof to make a particularized showing of irreparable harm and also failed to maintain this showing in the face of defendant's contrary evidence. A grant of a preliminary injunction under these circumstances falls outside the principled range of outcomes. Thus, the circuit court abused its discretion when it granted the injunction. Accordingly, we reverse the Court of Appeals and vacate the circuit court order.[21]

Reversed; preliminary injunction vacated.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

KELLY, J. (*dissenting*). I disagree with the majority's conclusion that the Pontiac Fire Fighters Union failed to meet its burden of showing that the proposed layoff of 28 firefighters would cause irreparable harm to the remaining firefighters.[1] The union alleged that the layoffs would lead to the closing of fire stations and would lengthen the time for responding to fires. The

[21] The trial court ruled, and the Court of Appeals majority agreed, that plaintiff demonstrated a likelihood of success on the merits of its underlying claims. Because plaintiff failed to prove that it would suffer irreparable harm from the layoffs, we take no position on whether plaintiffs could successfully prove a breach of the CBA or an unfair labor practice.

[1] The union had filed an unfair labor practice charge against defendant with the Michigan Employment Relations Commission (MERC). It requested an injunction from the circuit court "pending resolution of the parties' dispute by MERC." It also asked for and received from the court an injunction to maintain the status quo pending compulsory arbitration under Act 312, MCL 423.231 *et seq*. But no Act 312 arbitration was actually pending when the circuit court issued the injunction. The injunction was properly issued in aid of MERC's jurisdiction over the unfair labor practice charge.

firefighters would travel longer distances to reach fires and would encounter longer-burning, and therefore more dangerous, fires. The fire chief's affidavit on behalf of the city did not rebut this allegation. To the extent that it granted injunctive relief on the basis of this unchallenged allegation, the circuit court did not abuse its discretion.[2]

The union alleged in counts 9, 24, and 25 of the verified complaint that the layoffs would affect firefighter safety:

> 9. Plaintiff is informed and believes that if the unilateral layoff decision is implemented, the Pontiac Fire Department will undergo substantial adverse reorganization which will include the closing of fire stations, the reduction of staffing on fire apparatus, the elimination of EMS-ALS rescue units, the realignment and expansion of fire territories, the elimination of mutual aid participation for hazardous materials and technical rescue responses, and other unilateral changes many of which will constitute violations of the Agreement in such matters as staffing, reduction of personnel on vacation, and use of Kelly days.
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> * * *
>
> 24. The layoff of 28 fire fighters and fire fighter paramedics will reduce the fire extinguishment and medical/rescue capability of the Fire Department to unacceptable levels posing a threat and hazard to fire fighters and citizens alike.
>
> 25. The reorganization of the Fire Department, the substantial reduction of personnel, and the closing of fire stations will increase response time to a fire scene and/or medical/rescue run. Increased response time of emergency

[2] MCR 3.310(A)(4) states that "[a]t the hearing on an order to show cause why a preliminary injunction should not issue, the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued . . . ."

equipment poses a hazard to responding fire fighters and citizens on the route. As a consequence of delay in responding to a fire scene, the fire escalates making extinguishment more difficult and increasing the danger to fire fighters and possibly occupants of a dwelling. The number of personnel at a fire scene will be limited and reduced to unsafe levels.

The city countered these allegations with an affidavit from Fire Chief Wilburt McAdams, which stated in relevant part:

2. That the great majority of calls to which the department responds are medical runs.

3. That the department will continue to maintain minimum staffing levels. In the event the department is at the minimum level of seventeen firefighters on a given day, private ambulance services will be used to respond to medical runs, and the City's firefighters will be used solely for fighting fires.

4. That, even after the layoff of the 28 firefighters, the department will have 89 firefighters, and will continue to operate utilizing both an incident command system and the "two in two out" rule which forbids any firefighter from entering a structure fire unless he/she is accompanied by another firefighter and there are two firefighters outside the structure. In addition, the department will continue to assign a safety officer to each fire. The number of firefighters at a fire scene will not be impacted.

5. Using the incident command system, firefighters will not enter a burning structure until there has been a careful assessment of the fire and the incident commander allows entry.

4. [sic] That, in addition, the department will continue to be in compliance with all applicable departmental rules and regulations of the City of Pontiac and State of Michigan, including all OSHA regulations. The statements of the NFPA are not binding rules and have not been adopted in Michigan.

> 5. [sic] The number of firefighters per rig will actually increase from 3-4 currently to 4 for all engines. In addition, the department will continue to participate in mutual aid, under which firefighters from other departments . . . can be called for assistance if needed.

The union's complaint alleged both that fewer firefighters would be available to fight fires and that their response time would be increased. The fire chief averred that the number of firefighters available to fight fires would remain the same, and so would the safety rules. However, the fire chief did not offer a solution to the problem of increased response time. Nor did he explain how existing safety rules would protect the firefighters who would confront more intense fires.

The circuit court issued a preliminary injunction specifically on the basis of the union's allegation that the closing of fire stations would affect the remaining fire stations' response time:

> . . . Plaintiff may be irreparably harmed since a reduction in the workforce and the closing of several City fire stations would result in a significant increased risk of harm for the remaining firefighters. Fewer fire fighters [sic] would be available to respond to fires and the closing of stations caused by the lay off would result in the firefighters having to cover a larger territory. The remaining firefighters would thus not be able to respond as quickly as they used to which means that they would be faced with fires that have increased in intensity or size and as a result are more dangerous.

The majority faults the circuit court for not considering the fire chief's affidavit, and it faults the union for not offering additional evidence in response to the affidavit. At the show-cause hearing, the union did offer to present additional testimony and diagrams of the

runs.[3] Thus, the union cannot be faulted for failing to present additional evidence. The majority's conclusion that the circuit court failed to consider the fire chief's affidavit is also unpersuasive. Rather, the union met its burden of proof through the unchallenged allegations in its complaint. To the extent that the circuit court based its order on these unchallenged allegations, it did not need to address the fire chief's other averments.

The circuit court did not abuse its discretion in concluding that irreparable harm to the remaining firefighters called for injunctive relief.[4] I would affirm the judgment of the Court of Appeals and the preliminary injunction.

WEAVER and CAVANAGH, JJ., concurred with KELLY, J.

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[3] In deciding not to take testimony, the circuit court followed *Campau v McMath*, 185 Mich App 724, 728; 463 NW2d 186 (1990). In that and other cases, the Court of Appeals held that an evidentiary hearing was not required for issuing an injunction. See also *Fancy v Egrin*, 177 Mich App 714, 722; 442 NW2d 765 (1989).

[4] The court additionally concluded that the union was likely to succeed on the merits because the parties' contract clearly prohibited layoffs and was in effect until a new contract was negotiated. The city could not use financial hardship as an excuse to violate the contract it had negotiated with the union. The Court of Appeals affirmed this conclusion.

DETROIT FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 344 v CITY OF DETROIT

Docket No. 131463. Argued November 7, 2007 (Calendar No. 7). Decided July 23, 2008.

The Detroit Fire Fighters Association, IAFF Local 344, brought an action for injunctive and declaratory relief in the Wayne Circuit Court after the city of Detroit announced, while compulsory arbitration was proceeding, a proposal for layoffs within and restructuring of the fire department. The court, Susan D. Borman, J., temporarily enjoined the city from implementing its proposal and referred the safety dispute to the arbitrator assigned to the compulsory arbitration case. The arbitrator, asserting a lack of jurisdiction, declined to decide whether the proposal would affect the safety of the remaining firefighters. Thereafter, the trial court concluded that the proposal raised factual questions relating to firefighter safety and may have implicated mandatory subjects of bargaining under the public employment relations act (PERA), MCL 423.201 *et seq*. Accordingly, the court enjoined the defendant from implementing its proposal before the arbitration proceedings were complete. The defendant appealed. The Court of Appeals, SCHUETTE, P.J., and BANDSTRA and COOPER, JJ., held that the trial court did not abuse its discretion in granting the injunction because, while layoff decisions themselves are not a mandatory subject of bargaining, the impact of the layoff decision is a mandatory subject of bargaining to the extent the layoffs relate to workload and safety. 271 Mich App 457 (2006). The defendant applied for leave to appeal, which the Supreme Court granted. 477 Mich 927 (2006). Following oral arguments, the Supreme Court ordered supplemental briefing, and then ordered reargument. 480 Mich 880 (2007).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, and MARKMAN, the Supreme Court *held*:

The circuit court erred when it issued the preliminary injunction preventing the implementation of the restructuring plan. The circuit court issued what amounted to a permanent injunction where the underlying merits of the alleged status quo violation would never be resolved, contrary to the requirements of MCR

3.310(A)(5). Where an employer's challenged action allegedly jeopardizes police or firefighter safety, it alters the status quo during the pendency of arbitration under 1969 PA 312 (Act 312), MCL 423.243, only if the action is inextricably intertwined with safety, and not merely arguably affects safety. Contrary to the holding in *Detroit Police Officers Ass'n v Detroit*, 142 Mich App 248 (1985), which is now overruled, a party claiming a violation of the status quo provision of Act 312 that petitions the circuit court for a preliminary injunction pending the resolution of the merits of the underlying status quo claim must meet the traditionally applicable standards for injunctive relief. If injunctive relief is granted, the court must decide the merits of the status quo claim within six months after the injunction is granted unless good cause is shown or the parties stipulate to a longer period.

1. The status quo provision of Act 312 prohibits both parties from changing, without consent, existing wages, hours, and other conditions of employment during Act 312 arbitration.

2. A union alleging that an employer's action will alter safety conditions, a mandatory subject of bargaining, during Act 312 arbitration in violation of the status quo provision must demonstrate that the employer's action is inextricably intertwined with safety, and not merely that it arguably affects safety. In the present case, the circuit court found only that the defendant's plan may have implicated safety and it never conclusively determined that the plan unlawfully altered the status quo because the plan actually affected firefighter safety. Accordingly, the circuit court erred in granting what was, in practice, a permanent injunction without resolving the merits of the alleged status quo violation.

3. A party seeking a preliminary injunction to prevent an alleged status quo violation must satisfy a two-step process. First, it must meet the traditional four-element test for preliminary injunction, under which a court must consider whether the moving party made the required showing of irreparable harm, whether harm to the applicant absent an injunction outweighs the harm it would cause to the adverse party, whether the moving party demonstrated that the underlying claim is likely to succeed on the merits, and whether the public interest will be harmed if an injunction is issued. Second, if the court determines that injunctive relief is warranted, it must promptly decide the merits of the status quo claim pursuant to MCR 3.310(A)(5), which requires the trial of the action on the merits to be held within six months after the injunction is granted, unless good cause is shown or the parties stipulate to a longer period.

Justice CAVANAGH concurred in the result only.

Reversed; injunction vacated; case remanded to the circuit court for further proceedings.

Justice KELLY, concurring in part and dissenting in part, agreed that the case should be remanded for a clear determination of whether a status quo violation occurred, but would not require the union to show irreparable harm, which should be presumed in light of the policy decision the Legislature made when it enacted Act 312 that any remedy other than an injunction would be inadequate. Because this Court should not impose policy choices that differ from those selected by the Legislature, *Detroit Police Officers Ass'n v Detroit* should not be overruled.

1. LABOR RELATIONS — POLICE AND FIRE DEPARTMENTS — STATUS QUO VIOLATIONS IN COMPULSORY ARBITRATION — SAFETY.

An action that affects safety, which is a mandatory subject of bargaining and "condition of employment," may not be undertaken during the pendency of compulsory arbitration of a labor dispute in a municipal police or fire department without violating the status quo provision of the compulsory arbitration statute (MCL 423.243).

2. LABOR RELATIONS — POLICE AND FIRE DEPARTMENTS — STATUS QUO VIOLATIONS IN COMPULSORY ARBITRATION — SAFETY — STANDARDS FOR DETERMINING STATUS QUO VIOLATIONS.

A claim that an employer's action jeopardizes the safety of police or firefighters in violation of the status quo provision of the compulsory arbitration statute can be established only by demonstrating that the action is inextricably intertwined with safety, and not merely that it arguably affects safety (MCL 423.243).

3. LABOR RELATIONS — POLICE AND FIRE DEPARTMENTS — STATUS QUO VIOLATIONS IN COMPULSORY ARBITRATION — INJUNCTIONS — STANDARDS FOR INJUNCTIVE RELIEF.

When determining whether to grant preliminary injunctive relief where a party alleges a status quo violation during the compulsory arbitration of a labor dispute in a municipal police or fire department, a court must consider whether the moving party made the required showing of irreparable harm, whether harm to the applicant absent an injunction outweighs the harm it would cause to the adverse party, whether the moving party demonstrated that the underlying claim is likely to succeed on the merits, and whether the public interest will be harmed if an injunction is issued (MCL 423.231 *et seq*.).

4. LABOR RELATIONS — POLICE AND FIRE DEPARTMENTS — STATUS QUO VIOLATIONS IN COMPULSORY ARBITRATION — RULINGS ON THE MERITS OF STATUS QUO VIOLATION CLAIMS.

If a court grants preliminary injunctive relief where there is an alleged status quo violation, the court must then decide the merits of the status quo claim within six months after the injunction is

granted unless good cause is shown or the parties stipulate to a longer period (MCL 423.231 *et seq*.; MCR 3.310[A][5]).

Helveston & Helveston, P.C. (by *Ronald R. Helveston* and *Mindy M. Schwartz*) for the Detroit Fire Fighters Association.

Bruce A. Campbell for the city of Detroit.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Richard P. Gartner*, Assistant Attorney General, for the Michigan Employment Relations Commission.

Dykema Gossett PLLC (by *John A. Entenman*, *Melvin J. Muskovitz*, and *F. Arthur Jones II*) for the Michigan Municipal League.

Nantz, Litowich, Smith, Firard & Hamilton (by *John H. Gretzinger*) for the city of Iron Mountain.

YOUNG, J. At issue in this public labor law dispute between plaintiff Detroit Fire Fighters Association and defendant city of Detroit is whether the circuit court properly issued a preliminary injunction to prevent the implementation of defendant's proposed layoff and restructuring plan where plaintiff contends that the plan violates the "status quo" provision of 1969 PA 312 (Act 312), MCL 423.243, by, among other things, jeopardizing the safety of the remaining firefighters. We conclude that the injunction was erroneously entered.

Where a party seeks a preliminary injunction to prevent an alleged status quo violation, a two-step process is required. First, the moving party must satisfy the traditional four-part test that is prerequisite for issuance of any preliminary injunction. Second, if the

conditions of the preliminary injunction test are met and the injunction is granted, the circuit court must promptly resolve the merits of the status quo claim. Pursuant to MCR 3.310(A)(5), if a preliminary injunction is granted, a "trial of the action on the merits must be held within 6 months after the injunction is granted, unless good cause is shown or the parties stipulate to a longer period."

The status quo provision of Act 312 prevents either party from altering, without consent, "existing wages, hours, or other conditions of employment," which concern mandatory subjects of bargaining, while Act 312 arbitration is pending. The status quo provision does not prevent parties from exercising their contractual rights if they do not alter an existing wage, hour, or other condition of employment. In this case, it is defendant's implementation of its restructuring and layoff plan that is at issue. Plaintiff claims that it is a change in "existing . . . conditions of employment" because it will jeopardize firefighter safety, which our precedent treats as a "condition of employment" and a mandatory subject of bargaining. Defendant, on the other hand, argues that it has the contractual right to lay off firefighters. Thus, in order for the status quo provision to be violated in this case, it must be determined that the restructuring and layoff plan actually alters a condition of employment, namely firefighter safety.

The question is what standard a circuit court must apply in order for it to determine that an employer's challenged action actually violates the status quo provision by altering this condition of employment. The Court of Appeals in *Oak Park Pub Safety Officers Ass'n v Oak Park*[1] recently adopted the standard that a staffing proposal must be "inextricably intertwined with safety" to be a mandatory subject of bargaining.

[1] 277 Mich App 317, 330; 745 NW2d 527 (2007).

We adopt this standard for circuit court review of the type of status quo violation claim presented here. A circuit court must conclude that the employer's challenged plan is so "inextricably intertwined with safety" that its implementation would impermissibly alter the status quo by altering this "condition" of employment. The circuit court must make thorough factual findings supporting such a conclusion.

Here, not only did the circuit court fail to resolve the safety claim on the merits, it entered what amounted to a permanent injunction without applying the traditional injunctive standards. Thus, we hold that the circuit court erroneously granted injunctive relief and the Court of Appeals erroneously affirmed that decision.

Accordingly, we reverse the Court of Appeals, vacate the preliminary injunction entered by the circuit court, and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

Plaintiff is the exclusive bargaining representative of eligible Detroit Fire Department (DFD) employees. Defendant is the employer. Both are parties to a collective bargaining agreement (CBA) that took effect in 1998 and expired on June 30, 2001. Until a new agreement is forged in the Act 312 arbitration, the parties continue to operate under the old CBA. That CBA states in pertinent part at Article 2.D that

> [t]he City reserves the right to lay off personnel for lack of work or funds; or for the occurrence of conditions beyond the control of the Department; or when such continuation of work would be wasteful and unproductive . . . .

In Article 14, the parties agreed that

> [w]ages, hours and conditions of employment legally in effect on the effective date of this agreement, shall, except as improved herein, be maintained during the term of this Agreement.
>
> It is not the intent of this Article to restrict, interfere with, prevent or hinder the City from carrying out its duties and responsibilities to the public well being, by way of illustration, but not limitation, those rights, duties and responsibilities enumerated in Article 2 and the Purpose and Intent clause hereof, subject to the City's obligations under PERA [public employment relations act] and other laws.

After the CBA expired in 2001, the parties were unable to agree to a new contract. In December 2002, plaintiff invoked compulsory arbitration under Act 312 to create a successor agreement. Act 312 is meant to provide an "alternate, expeditious, effective, and binding" arbitration process.[2] Unless otherwise agreed by the parties, Act 312 requires the arbitrator to call a hearing within 15 days of being appointed,[3] conclude the hearing within 30 days of its commencement,[4] and issue a written opinion within 30 days of the conclusion of the hearing.[5] Here, the parties waived the time limitations that Act 312 imposes on the arbitration process. As a result, the "expeditious" Act 312 arbitration process is still pending after more than five years.

Defendant experienced serious budget shortfalls during the ongoing Act 312 arbitration. These difficult

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[2] Section 1 of Act 312 provides, in pertinent part: "It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an *alternate, expeditious, effective and binding procedure for the resolution of disputes* . . . ." MCL 423.231 (emphasis added).

[3] MCL 423.236.

[4] *Id*.

[5] MCL 423.238.

financial circumstances affected the operations of the DFD, leading defendant to implement a restructuring plan and a round of layoffs, effective July 1, 2005. Unfortunately, the budget problems persisted, and defendant announced, in September 2005, an additional plan to restructure the DFD. Under this plan, defendant proposed to lay off 65 firefighters, demote 10 battalion chiefs, and reduce the number of battalions from eight to five. The plan reassigned the battalion chief's duties at "garden variety fires" to the senior officer at the scene, and deactivated five engine and ladder companies.

Plaintiff filed suit in the Wayne Circuit Court on September 12, 2005, seeking declaratory and injunctive relief to stop the September 2005 reorganization plan from going into effect while the Act 312 arbitration was pending. Plaintiff argued that unilateral implementation of the restructuring plan violated the status quo provision of Act 312 because it required unilateral alteration of minimum staffing, job duties, seniority, parity, and emergency medical service requirements, all of which affected both firefighter safety and mandatory subjects of bargaining.

The circuit court held hearings beginning in late September, and granted plaintiff's request for a preliminary injunction on October 17, 2005. The court found that there were issues of fact concerning whether the layoffs would have an impact on the safety of the firefighters—a mandatory subject of bargaining under this Court's decision in *Local 1277, Metropolitan Council No. 23, AFSCME, AFL-CIO v City of Center Line*[6] (*Center Line II*).

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[6] 414 Mich 642; 327 NW2d 822 (1982).

The circuit judge sent the case to the assigned Act 312 arbitrator, Michael P. Long, to decide the safety issue and render his decision by October 27, 2005, at which time the circuit judge would determine if the preliminary injunction would remain in place. Although he held hearings, the arbitrator responded to the circuit court in an October 27, 2005, opinion stating that he was "not able to make any well reasoned determination as to the resolution of this dispute." Arbitrator Long indicated that he lacked jurisdiction to decide the safety issue, observing that "[t]he normal channels were not followed regarding reference of the matter to [Act] 312 arbitration." He sent the case back to the circuit court and recommended that the circuit court order the parties to mediation while keeping the injunction in place until the mediation process concluded.

The circuit court again granted a preliminary injunction in an October 31, 2005, order following another hearing. At this hearing the court reviewed its earlier statements and conceded:

> I do want to say for the record after reading the transcript of the previous hearing of the 17th, that I felt that my choice of words was inapt because it sounded like I was making a determination that there was an impact. That is not my place to do that.

However, the circuit judge clarified, "I find that there's a serious question of fact as to whether or not [the restructuring plan] would have an impact on fire fighters' safety, or indeed upon working conditions or working hours." Relying on *Center Line II* and *Detroit Police Officers Ass'n v Detroit*,[7] the court found that the reorganization and layoff plan "may implicate mandatory provisions of collective bargaining, namely the

[7] 135 Mich App 660; 354 NW2d 297 (1984), vacated 419 Mich 915 (1984).

impact on [sic] the Plan on the hours and conditions of employment (including the safety) of the members of the plaintiff." The preliminary injunction order enjoined defendant from eliminating the battalion chiefs, eliminating the firefighting companies, and laying off the firefighters. It also ordered the parties to take all necessary steps to have the matter brought before an Act 312 panel to determine the factual questions surrounding the safety issues. The order maintained the injunction until the issuance of a final and binding Act 312 award.

The Court of Appeals affirmed the circuit court in a published decision.[8] Observing that the parties had a duty under PERA to collectively bargain about mandatory subjects of bargaining and that layoff decisions are not mandatory subjects, the panel relied on this Court's decision in *Center Line II* to hold that "where, as here, proposed layoffs and restructuring may impact the safety of working conditions for firefighters, those proposals are mandatory subjects of bargaining."[9] The panel agreed with the circuit court's finding that "the evidence established 'serious issues of fact' as to whether the proposed changes would impact safety, working conditions and working hours," and as a result "the proposed changes were subjects of mandatory bargaining, and defendant could not therefore make these unilateral alterations while the parties are engaged in compulsory arbitration."[10] It disagreed with defendant's argument that injunctive relief was inappropriate because the terms of the CBA permitted defendant to carry out the restructuring plan.

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[8] *Detroit Fire Fighters Ass'n v Detroit,* 271 Mich App 457; 722 NW2d 705 (2006).

[9] *Id*. at 461.

[10] *Id*. at 463.

Defendant filed an application for leave to appeal with this Court. This Court granted leave to appeal.[11] Following oral arguments, this Court ordered supplemental briefing,[12] and subsequently ordered reargument.[13]

STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of a temporary injunction for abuse of discretion.[14] There is an abuse of discretion when the trial court's decision falls outside the range of principled outcomes.[15] A question of statutory interpretation is a question of law that we review de novo.[16] Finally, issues of contract interpretation are also questions of law reviewed de novo.[17]

ANALYSIS

Public labor relations in Michigan are governed by PERA. One of PERA's primary purposes "is to resolve

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[11] 477 Mich 927 (2006). The grant order asked the parties to brief "whether the defendant may implement the restructuring plan, or lay off firefighters, before coming to an agreement with the plaintiff about the impact of those actions."

[12] 478 Mich 1201 (2007). In this order, we asked the parties to address (1) whether *Metropolitan Council No 23, Local 1277, AFSCME, AFL-CIO v Center Line*, 78 Mich App 281; 259 NW2d 460 (1977) (*Center Line I*), correctly held that jurisdiction to enforce § 13 of Act 312, MCL 423.243, resides in the circuit court, and (2) whether the Michigan Employment Relations Commission has primary jurisdiction to enforce § 13, see *Travelers Ins Co v Detroit Edison*, 465 Mich 185; 631 NW2d 733 (2001). Given our resolution of this case, we do not reach the issues we asked the parties to address on reargument.

[13] 480 Mich 880 (2007).

[14] *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001).

[15] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[16] *Costa v Community Emergency Med Services*, 475 Mich 403, 408; 716 NW2d 236 (2006).

[17] *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

labor-management strife through collective bargaining."[18] Under PERA a public labor union may not strike when disagreements arise in the collective bargaining process.[19] Because public sector labor unions in Michigan lack the right to strike, they lack a significant tool to leverage their bargaining position.

By its own terms, Act 312 is "supplementary" to PERA, which was enacted over 20 years earlier.[20] Act 312 was intended, in the specific context of police and firefighter unions, to redress the imbalance in bargaining power created by the prohibition of strikes, and to preclude the possibility of an illegal strike by these unions that provide vital public services, namely police and fire protection. As Justice COLEMAN observed:

> When policemen engage in a strike, the community becomes immediately endangered by the withdrawal of their services. Likewise, our case law has often focused on the fact that fire fighters have a distinct and crucial employment relationship with a public employer.[21]

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[18] *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 311; 550 NW2d 228 (1996).

[19] MCL 423.202.

[20] MCL 423.244 ("This act shall be deemed as supplementary to Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948, and does not amend or repeal any of its provisions; but any provisions thereof requiring fact-finding procedures shall be inapplicable to disputes subject to arbitration under this act.").

[21] *Dearborn Fire Fighters*, 394 Mich at 279 (opinion of COLEMAN, J.). In *Dearborn Fire Fighters*, with three justices not participating, the remaining four justices considered the constitutionality of Act 312. Justice LEVIN and Chief Justice KAVANAGH held that the act was unconstitutional as an unlawful delegation of legislative power. Justice COLEMAN held the statute constitutional in its entirety. Justice WILLIAMS held the statute constitutional on the facts of the case. With the members of this Court evenly split, the Court of Appeals decision upholding the constitutionality of Act 312 was affirmed. The constitutionality of Act 312 was again considered

Thus,

> [u]nder Act 312, if the public employer and the police offers' or fire fighters' bargaining unit have not reached an agreement concerning a mandatory subject of bargaining, and mediation proves unsuccessful, either party may initiate binding arbitration in order to avert a strike.[22]

The status quo provision of Act 312 states that

> [d]uring the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act.[23]

Recalling the delicate balance of bargaining power our labor statutes seek to preserve in police and firefighter labor disputes, this provision was intended to prevent either party from gaining unfair leverage during the pendency of Act 312 interest arbitration.

Under the status quo provision, neither party without consent can alter "existing wages, hours, and other conditions of employment" while Act 312 arbitration is pending. We observed in *Center Line II* that safety is a condition of employment and, as such, a mandatory subject of bargaining.[24] Consequently, the status quo

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and upheld by a majority of this Court in *Detroit v Detroit Police Officers Ass'n*, 408 Mich 410; 294 NW2d 68 (1980), and *Center Line II*.

[22] *Dearborn Fire Fighters*, 394 Mich at 280 (opinion of COLEMAN, J.).

[23] MCL 423.243.

[24] See *Center Line II*, 414 Mich at 661-664. See also, e.g., *Manistee v Manistee Fire Fighters Ass'n, Local 645, IAFF*, 174 Mich App 118, 122; 435 NW2d 778 (1989). In *Center Line II*, one of the central issues was the scope of an Act 312 panel's authority. This Court interpreted Act 312 in the context of PERA's distinction between mandatory and permissive subjects of bargaining, observing that "[w]hile Act 312 does not specifically delineate the scope of the arbitration panel's authority, it can be inferred from an analysis which considers [PERA] . . . and Act 312 together." *Id*. at 651-652. We held that "[g]iven the fact that Act 312

provision prohibits changes to an existing condition of employment such as safety during the pendency of Act 312 arbitration.

Of chief importance in a case involving an alleged status quo violation is whether an employer's restructuring and layoff plan alters a condition of employment such as safety. The Court of Appeals recently held in *Oak Park* that where a union seeks to compel Act 312 arbitration with respect to staffing decisions, it must demonstrate that those decisions are "inextricably intertwined with safety" to constitute a mandatory subject of bargaining.[25] If it does not, then the employer cannot be compelled to arbitrate the staffing decision under Act 312. The *Oak Park* panel rejected as "unten-

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complements PERA and that under § 15 of PERA the duty to bargain only extends to mandatory subjects, . . . the arbitration panel can only compel agreement as to mandatory subjects." *Id*. at 654. Thus, we concluded that the Act 312 panel in *Center Line II* exceeded the scope of its authority when it compelled the parties to accept a layoff provision as part of a new labor contract because the layoff clause, which provided that police officer layoffs for lack of funds could only be made in conjunction with layoffs and cutbacks in other departments, fell within the scope of management prerogative and was outside the realm of mandatory subjects of bargaining. However, *Center Line II* cautioned that "while the initial decision to lay off is not a mandatory subject of bargaining, and therefore cannot be compelled in an arbitration award, it is clear that there is a duty to bargain over the *impact* of that decision." *Id*. at 661. The impact of the decision to lay off, according to *Center Line II*, might implicate a mandatory subject of bargaining that triggers the duty to collectively bargain.

In this case, both parties appear to concede that, consistent with *Center Line II*, defendant retains the prerogative to lay off firefighters. However, plaintiff argues that the *impact* of the restructuring plan, which includes layoffs, implicates a mandatory subject of bargaining because it affects firefighter safety, a "condition of employment" that should not be altered during Act 312 arbitration proceedings.

[25] *Oak Park*, 277 Mich App at 329-330. See also *Trenton v Trenton Fire Fighters Union, Local 2701, IAFF*, 166 Mich App 285; 420 NW2d 188 (1988).

able" the union's proposed alternative standard that "as long as a staffing decision *arguably* affects, concerns, or relates to safety—whether the effect be minimal, insignificant, or unjustifiable—the issue of staffing is a condition of employment that is subject to mandatory arbitration."[26] It reasoned:

> The standards implemented by the hearing referee and MERC in this case are consistent with the requirement that only those matters that have a significant impact on conditions of employment are subject to mandatory bargaining. The impact of a staffing decision on working conditions, including safety, must be proven to be significant, not merely to *arguably* exist. . . . To adopt the union's position would be tantamount to requiring that most, if not all, minimum staffing proposals—particularly with regard to [public safety officers], police officers, firefighters, and others engaged in high-risk professions—be subject to mandatory bargaining, given that a reduction in the number of these employees will arguably have some—albeit minimal—impact on safety. Such a conclusion would have the effect of invading the city's prerogative to determine the size and scope of its business, including the services it will provide. We decline to reach such a conclusion.[27]

Although *Oak Park* addressed a different legal issue and not the status quo issue presented here, we find the logic and standard endorsed by *Oak Park* compelling in this context.[28] A hasty or tentative finding that a

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[26] *Oak Park*, 277 Mich App at 326.

[27] *Id*. at 329-330 (citations omitted).

[28] In *Oak Park*, the city filed an unfair labor practice charge against the union, alleging that the union unlawfully demanded bargaining over permissive bargaining subjects, such as a safety/staffing provision, in an Act 312 arbitration. The hearing referee and the MERC panel ruled in favor of the city, deciding that the union breached its duty to bargain in good faith. The Court of Appeals affirmed in a published opinion per curiam.

restructuring and layoff plan violates the status quo would "invad[e] the city's prerogative to determine the size and scope of its business, including the services it will provide,"[29] just as surely as if every employer's staffing decision that merely *arguably* affected safety conditions were subject to mandatory bargaining. Thus, whether a layoff and restructuring plan jeopardizes employee safety requires a careful examination of the plan details and a finding that the plan is "inextricably intertwined with safety" such that it would have a "significant impact" on safety.[30]

The central problem with the circuit court's decision in this case, and by extension the Court of Appeals decision to affirm it, is that it only found that defendant's layoff and restructuring plan "may" implicate a mandatory subject of bargaining and that this case "raised questions of fact" about firefighter safety. After issuing the preliminary injunction, the circuit court never conclusively determined that the plan unlawfully altered the status quo. Indeed, the circuit court expressly stated that it was not deciding the merits of plaintiff's claim. And, when the circuit court attempted to induce Arbitrator Long to resolve the safety dispute, he declined to do so.

Given the magnitude of a decision to restrain an employer's exercise of a management prerogative, this level of uncertainty in a circuit court ruling is untenable. By its terms, this injunction was to remain in place until the conclusion of Act 312 arbitration, but a determination on the merits would never have been made. On a practical level, what was termed by the circuit court a "preliminary injunction" became a de facto permanent injunction, without resolving the mer-

[29] *Id*. at 330.

[30] *Id*.

its of the alleged status quo violation. Moreover, the injunction was issued where the traditional elements required for injunctive relief had not been established. Specifically, although the circuit court found that there were "issues of fact" regarding the safety issue, it did not find that there was a likelihood of success on the merits in this regard, nor did the court conclude that the firefighters would suffer irreparable harm.

Where a party seeks a preliminary injunction to prevent an alleged status quo violation as in this case, the party must satisfy a two-step process. First, it bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction. The trial court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued.[31]

Second, if a trial court determines that the standards for a preliminary injunction have been met and chooses

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[31] *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984). See also *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 10-11; 753 NW2d 595 (2008). We disagree with and overrule as inconsistent with this Court's decision the Court of Appeals holding in *Detroit Police Officers Ass'n v Detroit*, 142 Mich App 248; 369 NW2d 480 (1985), that the traditional injunctive standards do not apply when issuing an injunction to remedy a violation of the status quo provision. This Court has consistently held that it is "basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace." *Holland School Dist v Holland Ed Ass'n*, 380 Mich 314, 326; 157 NW2d 206 (1968); see also *Michigan State Employees Ass'n*, 421 Mich at 164-165; *Michigan Law Enforcement Union, Teamsters Local 129 v Highland Park*, 422 Mich 945 n 1 (1985). An injunction concerning a dispute about the status quo provision should be treated no differently.

to issue an injunction, it must promptly decide the merits of the status quo claim. MCR 3.310(A) governs preliminary injunctions. Subsection 5 requires that "[i]f a preliminary injunction is granted . . . [t]he trial of the action on the merits must be held within 6 months after the injunction is granted, unless good cause is shown or the parties stipulate to a longer period."[32]

Therefore, on remand, the circuit court must engage in this two-step inquiry. First, it must determine whether plaintiff has satisfied the traditional four-part test for a preliminary injunction, particularly that plaintiff has demonstrated a likelihood of success on the merits that the plan is "inextricably intertwined with safety" and made a showing of irreparable harm. Second, if the circuit court issues a preliminary injunction, there must be a determination on the merits that the challenged employer action is "inextricably intertwined with safety" as that standard was articulated in *Oak Park*. It must do more than conclude that the challenged employer action *arguably* affects safety. To that end, any decision by the circuit court that the employer action is "inextricably intertwined with safety" must be conclusive and supported by specific, detailed findings of fact.

CONCLUSION

We hold that the circuit court erred when it issued the preliminary injunction preventing the implementation of the restructuring plan. The circuit court issued what amounted to a permanent injunction where the underlying merits of the alleged status quo violation

[32] However, MCR 3.310(A)(2) permits the court to accelerate the process by advancing and consolidating the trial of the action on the merits with the hearing on the motion. In either case, the merits of the claim cannot remain unresolved.

would never be resolved, contrary to the requirements of MCR 3.310(A)(5). We further hold that, when a safety claim is alleged, an employer's challenged action alters the status quo during the pendency of an Act 312 arbitration only if the action is so "inextricably intertwined with safety" that the action would alter a "condition of employment."

We reverse the Court of Appeals judgment, vacate the preliminary injunction entered by the circuit court, and remand the case to the circuit court for further proceedings consistent with this opinion.

TAYLOR, C.J., and WEAVER, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

CAVANAGH, J. I concur in the result only.

KELLY, J. (*concurring in part and dissenting in part*). I concur in the majority's decision to remand this case to the circuit court for a clear determination of whether the city of Detroit's reorganization plan violates § 13 of Act 312. The remand is necessary because the circuit court stated its conclusions in terms that are too tentative.

The circuit court must determine whether the union is likely to succeed on the merits of its claim that a status quo violation occurred. If it finds such a likelihood, it may presume that the union will be irreparably harmed should the violation not be enjoined for the duration of the arbitration proceedings. Because I have reached this conclusion, it follows that I would not overrule *Detroit Police Officers Ass'n v Detroit*.[1]

[1] *Detroit Police Officers Ass'n v Detroit*, 142 Mich App 248; 369 NW2d 480 (1985) (*Detroit POA*).

In *Detroit POA*, the Court of Appeals held that the trial court was not required to make a finding of irreparable harm or inadequate remedy at law before enjoining violations of § 13 of Act 312.[2] It relied on the interpretation by federal courts of a similar status quo provision in the federal Railway Labor Act (RLA).[3] That provision states in relevant part that "rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board . . . ."[4]

Federal courts, including the United States Supreme Court, have held that this provision allows injunctive enforcement by the district courts without a showing of irreparable harm in cases of major disputes.[5] Federal courts forgo the traditional requirement of irreparable harm because the plain statutory language does not require such a showing and irreparable harm is presumed in cases involving major disputes.[6]

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[2] *Id*. at 253.

[3] 45 USC 151 *et seq*.

[4] 45 USC 156.

[5] Major disputes involve disagreements over future contractual rights or changes in the terms in existing agreements. The parties are required to maintain the status quo during a lengthy bargaining and mediation process. *ABX Air, Inc v Airline Professionals Ass'n of the Int'l Brotherhood of Teamsters, Local Union No 1224, AFL-CIO*, 266 F3d 392, 396 (CA 6, 2001). The United States Supreme Court authorized the use of injunctive relief to enforce the status quo provision of the RLA for major disputes. *Consolidated Rail Corp v R Labor Executives' Ass'n,* 491 US 299, 303; 109 S Ct 2477; 105 L Ed 2d 250 (1989). In *Detroit & Toledo Shore Line R Co v United Transportation Union*, 396 US 142, 150; 90 S Ct 294; 24 L Ed 2d 325 (1969), the Supreme Court explained its rationale: "[D]elaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout."

[6] A showing of irreparable injury is not required in light of the public interest in settlement of labor disputes and the fact that the duty to

The majority argues that issuing an injunction without a showing of irreparable harm goes against the public policy of this state and that a status quo violation should not receive special treatment.[7] However, only one of the cases cited by the majority involves a violation of § 13 of Act 312. In its peremptory order in that case, the Court did not consider the public policy concerns codified in Act 312.[8] And when the Court had an opportunity to consider whether the holding of *Detroit POA* contradicted the public policy of this state, it denied leave to appeal.[9]

It is an accepted rule of statutory construction that the Court should not impose policy choices that differ from those selected by the Legislature.[10] The majority here acknowledges the public policy concerns that occasioned the passing of Act 312: "Act 312 was intended, in the specific context of police and firefighter unions, to redress the imbalance in bargaining power created by the prohibition of strikes, and to preclude the possibility of an illegal strike by these unions that provide vital public services, namely police and fire protection."[11] These policy concerns are expressly codified in two statutes: MCL 423.231, which affords arbitration to police and firefighter unions as "an alternate, expeditious, effective and binding procedure for the resolution

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maintain the status quo "contains no qualification to the effect that the carrier has no obligation to [maintain the status quo] unless irreparable injury would otherwise result." *Southern R Co v Brotherhood of Locomotive Firemen and Enginemen,* 337 F2d 127, 133-34 (DC Cir, 1964).

[7] *Ante* at 34 n 31.

[8] See *Michigan Law Enforcement Union, Teamsters Local 129 v Highland Park*, 422 Mich 945 n 1 (1985).

[9] *Detroit Police Officers Ass'n v Detroit*, 424 Mich 894 (1986).

[10] *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999).

[11] *Ante* at 29.

of disputes,"[12] and MCL 423.243, which prohibits unilateral changes in the status quo while arbitration is pending.[13]

The traditional requirement of irreparable harm requires a determination that the injury cannot be repaired by means other than an injunction.[14] A unilateral change in the status quo has an obviously negative effect on a union's bargaining power. It compromises the integrity of the bargaining process. Because of the bargaining disadvantage at which unilateral changes place a union, the union is unlikely to attain a retroactive restoration of the status quo. Because a strike is the only method of maintaining bargaining power in the face of a unilateral change, Act 312 aims to prevent the resort to strikes by police and firefighters. Thus, in passing Act 312, the Legislature effectively decided that any remedy other than an injunction would be inadequate. Consequently, a status quo violation presumptively causes irreparable harm.

The Court of Appeals in *Detroit POA* did not err in concluding that no showing of irreparable harm was necessary to enjoin violations of the status quo during Act 312 arbitration. While I concur in the decision to remand this case to the circuit court, I would not

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[12] MCL 423.231 states in relevant part: "It is *the public policy of this state* that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford *an alternate, expeditious, effective and binding procedure for the resolution of disputes* . . . ." (Emphasis added.)

[13] MCL 423.243 states: "During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act."

[14] *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 241; 634 NW2d 692 (2001) (CAVANAGH, J., dissenting).

require the union to show irreparable harm. Such harm should be presumed if the court determines that the city's reorganization plan violates the status quo.[15]

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[15] I believe that the most important reason for issuing an injunction for the duration of Act 312 arbitration proceedings is to protect the parties' bargaining positions. But irreparable harm should be presumed in the case of a status quo violation for another reason as well.

The majority posits that, to show a status quo violation, the union must demonstrate that the city's reorganization plan is "so 'inextricably intertwined with safety' that its implementation would impermissibly alter the status quo by altering this 'condition' of employment." *Ante* at 23. But the impact of proposed layoffs on firefighter safety was also deemed relevant to the question of irreparable harm in *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 10-11; 753 NW2d 595 (2008) which the majority cites for the four traditional elements of injunctive analysis. *Ante* at 34 n 31. Unlike *Pontiac*, this case involves an Act 312 arbitration, so the majority directs the circuit court to look for both irreparable harm and a status quo violation. If both these inquiries are premised on the impact of the layoffs on firefighter safety, then the majority essentially directs the circuit court to engage in a duplicative analysis.

PEOPLE v GARDNER

Docket No. 131942. Decided July 23, 2008.

A Wayne Circuit Court jury convicted Caprese D. Gardner of second-degree murder, being a felon in possession of a firearm, and possessing a firearm during the commission of a felony. The court, Prentis Edwards, J., sentenced the defendant under MCL 769.11 as a third offense habitual offender to concurrent prison terms of 25 to 50 years for the murder conviction and 2 to 10 years for the felon-in-possession conviction and to a consecutive 5 year term for the felony-firearm conviction. The two prior felonies that the court used for the habitual offender enhancement arose from the same criminal act. On appeal, the defendant challenged several of the court's evidentiary rulings, but did not raise the issue of using multiple felonies arising from the same incident or transaction for habitual offender enhancement. The Court of Appeals, GAGE, P.J., and MURPHY and JANSEN, JJ., affirmed the defendant's convictions and sentences in an unpublished opinion per curiam, issued April 13, 2003 (Docket No. 238186), and the Supreme Court denied leave to appeal, 469 Mich 975 (2003). The defendant subsequently sought relief from the judgment in the trial court, arguing that his trial and appellate attorneys had provided ineffective assistance of counsel by failing to challenge the manner in which the trial court used his two prior felony convictions when determining his habitual offender status. The defendant argued that, under *People v Stoudemire*, 429 Mich 262 (1987), and *People v Preuss*, 436 Mich 714 (1990), the trial court should have counted the two convictions as a single prior conviction because they arose from the same criminal act. Had the court done so, the defendant argued, he would have faced potentially shorter prison terms for the murder and felon-in-possession convictions. The trial court denied the defendant's motion, concluding that the defendant had not established good cause for his failure to raise the issue in his prior appeal. The Court of Appeals, TALBOT, P.J., and FITZGERALD and SMOLENSKI, JJ., denied the defendant's application for leave to appeal in an unpublished order, entered July 10, 2006 (Docket No. 267317). The Supreme Court ordered and heard oral argument on

whether to grant the defendant's application for leave to appeal or take other peremptory action. 477 Mich 1096 (2007).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR and Justices YOUNG and MARKMAN, the Supreme Court *held*:

A court must count each separate felony conviction that preceded the sentencing offense when determining a defendant's habitual offender status, regardless of whether any of the convictions arose out of the same criminal act or incident.

1. Habitual offender status generally gives a sentencing court the option to increase a repeat offender's maximum sentence, and it also increases the high end of the minimum sentence range recommended for the offender under the sentencing guidelines. The defendant would have been subject to a maximum sentence of life imprisonment for his second-degree murder conviction regardless of any habitual offender enhancement. If the sentencing court had sentenced the defendant as a second offense habitual offender, his recommended minimum sentence range would have been 180 to 375 months rather than 180 to 450 months. Although the defendant's 25 year minimum sentence is within both of these ranges and the 180 to 300 month range that would have applied with no habitual offender enhancement, resentencing would nonetheless be required in this case if the trial court relied on an inaccurate higher range when it imposed the defendant's minimum sentence.

2. MCL 769.11(1) requires a court to count any combination of prior felony convictions for purposes of habitual offender enhancement. The plain language of the statute does not require that the convictions arose from separate incidents. *Stoudemire* and *Preuss* erred by considering the legislative history of the habitual offender statutes and adding a same incident test to the statutory requirements, and those cases are overruled.

3. The defendant was properly sentenced as a third offense habitual offender because he had been convicted of two prior felonies. A defendant claiming ineffective assistance of counsel cannot show prejudice by defense counsel's failure to raise an objection that would have been supported by a decision that was subsequently overruled. Thus, resentencing is not required in this case.

Sentences affirmed.

Justice WEAVER concurred only in the result of the majority opinion. The defendant suffered no material injustice in this case. Any error in the defendant's sentencing was harmless, and the defendant need not be resentenced.

Justice CAVANAGH, joined by Justice KELLY, dissenting, would not overrule *Stoudemire* and *Preuss*. The Legislature intended the habitual-offender statutes to apply to individuals who persist in criminal activity despite having been convicted. Until now, the Court has consistently held that all predicate felony convictions used for habitual-offender purposes must have arisen from separate criminal incidents. The language of the habitual-offender statutes, and the statutory scheme of which they are a part, indicates a legislative intent to require separate incidents. The legislative history of the statutes supports the *Preuss* rule. Even if the majority's interpretation of the statutes were correct, however, the rule of lenity should apply because there are still plausible, competing interpretations of these criminal statutes, and *Preuss* should not be overruled. Because the defendant's prior felony convictions arose out of the same criminal act, they should be counted as only one prior conviction, and the defendant should be resentenced as a second-offense habitual offender.

Justice KELLY, dissenting, joined Justice CAVANAGH's dissent and agreed with him that *Preuss* should not be overruled, but wrote separately to object to the majority's refusal to apply stare decisis in this case and recent Supreme Court cases. *Preuss* was correctly decided. When determining whether to overrule a case, however, whether the case was correctly decided is only the first step in the test set forth in *Robinson v Detroit*, 462 Mich 439 (2000). Even when a case was decided incorrectly, before overruling it, the Court must also examine whether the prior decision remains workable, the degree of reliance on the decision, and whether changes in the law or facts have undermined the basis of the decision. Additionally, overruling a precedent requires some special justification. None of these factors is present with regard to *Preuss*.

SENTENCES — HABITUAL OFFENDERS — PRIOR CONVICTIONS OF HABITUAL OFFENDERS — SAME INCIDENT OR TRANSACTION.

The habitual offender statutes require a sentencing court to count each separate felony conviction that preceded the sentencing offense when determining an offender's habitual offender status, regardless of whether any of the convictions arose out of the same criminal act or incident (MCL 769.11[1]; MCL 769.12[1]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Olga Agnello*, Assistant Prosecuting Attorney, for the people.

Arthur James Rubiner and Caprese D. Gardner, in *propria persona*, for the defendant.

Amicus Curiae:

Jacqueline J. McCann for the Criminal Defense Attorneys of Michigan.

CORRIGAN, J. In this case, we consider the correct method for counting prior felonies under Michigan's habitual offender statutes, MCL 769.10, 769.11, 769.12, and 769.13. These statutes establish escalating penalties for offenders who are repeatedly convicted of felonies. This Court has ruled that the statutes imply that each predicate felony must arise from separate criminal incidents. *People v Preuss,* 436 Mich 714; 461 NW2d 703 (1990); *People v Stoudemire,* 429 Mich 262; 414 NW2d 693 (1987), mod by *Preuss, supra* at 739. Therefore, multiple felonies that arise from the same criminal incident or transaction count as a single felony under the habitual offender laws.

We conclude that the holdings of *Stoudemire* and *Preuss* directly contradict the plain text of the statutes. Therefore, we overrule these cases. The unambiguous statutory language directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions. Accordingly, defendant was properly sentenced and we affirm his sentences.

I. FACTS AND PROCEDURAL HISTORY

In 2001, a jury convicted defendant, Caprese D. Gardner, of second-degree murder, MCL 750.317, being a felon in possession of a firearm (felon in possession), MCL 750.224f, and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

The facts underlying his convictions do not bear on the current question before this Court. On August 30, 2001, the circuit court sentenced defendant as a third offense habitual offender, MCL 769.11, to concurrent prison terms of 25 to 50 years for the murder conviction and 2 to 10 years for the felon in possession conviction and a consecutive term of 5 years for the felony-firearm conviction. On direct appeal, defendant challenged several of the circuit court's evidentiary rulings, but did not raise the present issue. The Court of Appeals affirmed his convictions and sentences.[1] This Court denied defendant's subsequent application for leave to appeal.[2]

In 2004, defendant sought relief from judgment under MCR 6.501 *et seq*. He argued that his appointed trial and appellate attorneys had provided constitutionally ineffective representation because they failed to investigate and challenge the two prior convictions underlying his third offense habitual offender status. For purposes of the habitual offender enhancement, defendant had stipulated at trial prior convictions of felonious assault and felony-firearm. In his motion for relief from judgment, defendant claimed that both of those convictions, for which he had been sentenced on February 25, 1988, arose from the same criminal act. Accordingly, he asserted that the two convictions should have been counted as a single prior felony conviction for purposes of applying the habitual offender laws under *Stoudemire* and *Preuss*. Thus, defendant argued that he should have been sentenced only as a second offense habitual offender, MCL 769.10, and therefore would have been exposed to potentially shorter prison terms for his murder and felon in possession convictions. He

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[1] *People v Gardner*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2003 (Docket No. 238186).

[2] 469 Mich 975 (2003).

also argued that he had good cause for belatedly raising this issue in a motion for relief from judgment under MCR 6.508(D)(3)(a) because his appellate attorney was constitutionally ineffective for failing to recognize and raise the issue in defendant's prior appeal.

The circuit court denied defendant's motion, opining that defendant had not established good cause for his failure to raise this issue in his prior appeal. The Court of Appeals denied defendant's application for leave to appeal "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)."[3]

Defendant then applied for leave to appeal in this Court. We heard oral argument on whether to grant his application or take other peremptory action. We directed the parties to address whether *Preuss* and *Stoudemire* "correctly held that multiple convictions arising out of a single criminal incident may count as only a single prior conviction for habitual offender purposes and, if so, whether the defendant is entitled to be resentenced."[4]

II. STANDARDS OF REVIEW

The primary question requires us to interpret Michigan's habitual offender statutes. This Court reviews de novo questions of statutory interpretation. *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007). We also review de novo the ultimate constitutional question whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment[5] right to counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

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[3] *People v Gardner*, unpublished order of the Court of Appeals, entered July 10, 2006 (Docket No. 267317).

[4] 477 Mich 1096 (2007).

[5] US Const, Am VI.

III. ANALYSIS

Defendant was sentenced as a third offense habitual offender under MCL 769.11, which reads, in pertinent part:

> *If a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies*, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, *and that person commits a subsequent felony within this state*, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows . . . . [MCL 769.11(1) (emphasis added).]

The same relevant language has appeared in each habitual offender statute[6] since 1978.[7] In 1987 and 1990, respectively, the *Stoudemire* and *Preuss* courts concluded that these statutes imply a same-incident or single-transaction method of counting prior felonies for purposes of sentencing enhancement. Accordingly, each predicate felony must "arise from separate criminal incidents." *Preuss, supra* at 717.

Habitual offender status may increase a defendant's minimum and maximum sentences.[8] The sentencing judge generally has the option to increase a repeat offender's maximum sentence.[9] The high end of the statutory recommended minimum sentence range un-

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[6] MCL 769.10(1); MCL 769.11(1); MCL 769.12(1).

[7] See *Preuss, supra* at 720.

[8] Michigan has a primarily indeterminate sentencing scheme. For most crimes, courts impose both a minimum and a maximum sentence. The maximum sentence is set by statute on the basis of the sentencing offense. The recommended minimum sentence range is set by statutory guidelines that take into account the circumstances of the particular offense and offender. MCL 769.8; MCL 769.34; *People v Harper,* 479 Mich 599, 612-613; 739 NW2d 523 (2007).

[9] MCL 769.10(1); MCL 769.11(1); MCL 769.12(1).

der the sentencing guidelines (the maximum minimum) also increases on the basis of the number of prior convictions. Second offense, third offense and fourth offense[10] habitual offenders face increases in their maximum minimums of 25 percent, 50 percent and 100 percent, respectively. MCL 777.21(3)(a) through (c).

Here, defendant would have been subject to a maximum penalty of life in prison for his second-degree murder conviction even without an habitual offender enhancement. His unenhanced minimum sentence range—based on a prior record variable score of 20 and an offense variable score of 65—was 180 to 300 months. MCL 777.61. Because he was sentenced as a *third offense* habitual offender, MCL 769.11(1), he was subject to an enhanced minimum sentence range of 180 to 450 months (a maximum minimum of 300 months increased by 50 percent), MCL 777.21(3)(b).

Defendant argues that, under *Stoudemire* and *Preuss*, he should have been sentenced only as a *second offense* habitual offender, MCL 769.10(1), because his two prior felony convictions arose from the same criminal incident. If he had been sentenced as a second offense habitual offender, his statutory minimum sentence range would have been 180 to 375 months (a maximum minimum of 300 months increased by 25 percent). Although his 300-month (25-year) minimum sentence falls within the minimum sentence ranges for both second and third offense habitual offenders, as well as the enhanced range, defendant correctly argues that, if the circuit court relied on an inaccurate higher range when it imposed the sentence, resentencing

[10] MCL 769.12(1) establishes enhanced maximum sentences for offenders with three or more prior felony convictions. For ease of reference, we call these offenders "fourth offense habitual offenders."

would be required. *People v Francisco,* 474 Mich 82, 89-92; 711 NW2d 44 (2006).

The prosecution does not contest defendant's claim that his two prior felony convictions of felonious assault and felony-firearm arose from the same criminal incident. The prosecution also concedes that defendant may raise the issue in his current motion for relief from judgment because, *if Stoudemire* and *Preuss* correctly interpreted the habitual offender statutes, defendant has been prejudiced by the constitutionally ineffective assistance of his appointed trial and appellate attorneys.[11] The prosecution argues, however, that *Stou-*

[11] Defendant's appointed attorneys did not raise the error at sentencing, in a motion for resentencing, or in a motion for remand in the Court of Appeals. Accordingly, defendant properly raises his argument in connection with a claim that he was denied his Sixth Amendment right to effective assistance of counsel. *Francisco, supra* at 90 n 8. An attorney is ineffective for Sixth Amendment purposes if his performance fell below an objective standard of reasonableness and the defendant was prejudiced as a result. *Strickland v Washington,* 466 US 668, 688, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). Any amount of additional prison time imposed as a result of an attorney's deficient performance has Sixth Amendment significance. *Glover v United States,* 531 US 198, 203; 121 S Ct 696; 148 L Ed 2d 604 (2001). Although we accord substantial deference to an attorney's strategic judgments, we can identify no strategic reason for the failure of defendants' attorneys here to raise such an obvious point of error that increased the possible minimum prison sentence to which defendant was exposed. Therefore, defendant has properly stated a claim of ineffective assistance of counsel.

For the same reasons, defendant has also properly alleged good cause and actual prejudice, as is necessary to seek relief in a motion for relief from judgment. MCR 6.508(D)(3). A defendant may establish good cause for not raising an argument for relief sooner by showing that his appellate attorney rendered ineffective assistance by failing to raise the issue in a proper post-trial motion or first-tier appeal. *People v Reed,* 449 Mich 375, 378; 535 NW2d 496 (1995) (opinion by BOYLE, J.). Appellate counsel's failure to "assert all arguable claims" or decision to "winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance." *Id.* at 391. Here, however, as noted, we

demire and *Preuss* were incorrectly decided and that defendant was properly sentenced as a third offense habitual offender under the plain language of the statute. We agree.

Our goal in construing a statute is "to ascertain and give effect to the intent of the Legislature." *People v Pasha,* 466 Mich 378, 382; 645 NW2d 275 (2002). The touchstone of legislative intent is the statute's language. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Accordingly, when statutory language is unambiguous, judicial construction is not required or permitted.[12] *Id.*

Here, the relevant language states that [i]f a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony within this state," the person shall be sentenced under the habitual offender laws. MCL 769.11(1). The text clearly contemplates the *number* of times a person has been "con-

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cannot identify any excuse for counsel's failure to raise an obvious error that would have guaranteed resentencing under *Francisco*. Because the nature and strength of the argument are obvious, the omission is not evidence of a reasonable professional decision to winnow out weaker arguments.

[12] "[O]nly a few provisions are truly ambiguous and . . . a diligent application of the rules of interpretation will normally yield a 'better,' albeit perhaps imperfect, interpretation of the law . . . ." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). A provision is not ambiguous just because "reasonable minds can differ regarding" the meaning of the provision. *Id.* at 165. "Rather, a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, or when it is equally susceptible to more than a single meaning." *Id.* at 166 (citation omitted). See *Klapp v United Ins Group Agency, Inc,* 468 Mich 459; 663 NW2d 447 (2003), for an example of truly ambiguous contractual language.

victed" of "felonies or attempts to commit felonies." Nothing in the statutory text suggests that the felony convictions must have arisen from separate incidents. To the contrary, the statutory language defies the importation of a same-incident test because it states that *any combination* of convictions must be counted. Indeed, *Stoudemire* and *Preuss* essentially acknowledged the clear import of the language. Nonetheless, in each case, the Court explicitly ignored the text, turning instead to legislative history and the Court's own views regarding the intents of the New York and Michigan legislatures.[13]

In 1987, the *Stoudemire* Court offered an initial interpretation of the relevant statutory language by observing that the original language of Michigan's habitual offender statutes, enacted by 1927 PA 175, was borrowed almost wholesale from New York's habitual offender statutes. *Stoudemire, supra* at 267. Accordingly, the Court referred to the remarks of the New York statutes' author, New York State Senator Caleb Baumes, who opined that the statutes were aimed at protecting the public from the professional criminal " 'who has been convicted once, twice, three times, sentenced *and served his time* and come . . . out and resumed operations again . . . .' " *Id.* at 268, quoting Baumes, *The Baumes law and legislative program in New York,* 52 ABA Rep 511, 521 (1927) (emphasis added in *Stoudemire*). The Court concluded that New York

[13] Justice ARCHER vigorously dissented in *Stoudemire*, arguing that the clear statutory language did not impose or permit a same-incident test. *Stoudemire, supra* at 282, 289 (ARCHER, J., dissenting). Justice ARCHER observed that, since 1865, this Court has recognized a fundamental rule of statutory construction: "When the language used in a statute is plain and unambiguous, a common-sense reading of the provision will suffice. No interpretation is necessary." *Id*. at 280. Justice ARCHER dissented in *Preuss* for the same reasons. *Preuss, supra* at 743 (ARCHER, J., concurring in part and dissenting in part).

courts had interpreted the New York statutes in keeping with Baumes's intent by establishing "that multiple convictions on the same day constitute only one 'conviction' for purposes of the habitual offender statute." *Stoudemire*, *supra* at 269, citing *People v Spellman*, 136 Misc 25; 242 NYS 68 (1930). The *Stoudemire* Court acknowledged, but rejected, other New York cases that conflicted with *Spellman*, concluding that "[t]hese opinions do not reflect awareness of the legislative intent clearly expressed by Senator Baumes" and observing that those courts' construction of the statutes had been superseded when the New York Legislature amended the statutes. *Stoudemire*, *supra* at 269 n 14.

The *Stoudemire* Court concluded:

> By borrowing New York's statute in its entirety, the Legislature indicated that it was motivated by the same purpose that underlay the New York statute. The Legislature intended that the habitual offender statute's fourth-felony provision, like the parallel provision in the New York statute, *should apply only to a person* who had had three opportunities to reform—*who had been convicted and sentenced and then subsequently committed another felony for which he was also convicted and sentenced, and then subsequent to the second conviction committed yet another felony, for which he was again convicted and sentenced*. [*Id.* at 271 (emphasis added).]

The Court also compared the intents of legislatures in other jurisdictions—as interpreted by courts in those jurisdictions—that had adopted methods for counting felonies based on whether the offenses grew out of the same occurrence, were committed on the same day, or were charged in the same indictment. *Id.* at 272-276. In accord, the Court held, consistently "with the legislative purpose underlying the habitual offender statute, that multiple convictions arising out of a single incident may count as only a single prior conviction for purposes

of the statute." *Id.* at 278. The Court concluded that, to the extent that the statutory text read otherwise, the Court should focus on legislative intent in order to avoid absurdity, hardship, or injustice. *Id.* at 266-267.

Significantly, *Stoudemire* avoided the import of the statutory text, in part, by dismissing the Legislature's 1978 revisions of the text in 1978 PA 77. Before 1978, the relevant portion of MCL 769.11 stated: "A person who *after having been twice convicted* within this state of a felony or an attempt to commit a felony . . . commits any felony within this state, is punishable upon conviction as [provided in this section]." (Emphasis added.)[14] Despite the revisions, the *Stoudemire* majority nonetheless relied on its perceptions of the history of the original 1927 act. The Court *explicitly recognized* that "the phrase 'If a person has been convicted of 3 or more felonies,' arguably has a different import than the phrase 'A person who after having been 3 times convicted . . . .' " *Stoudemire*, *supra* at 278. But the Court dismissed this significant change, concluding that "when considered in the context of the other changes made in the statute it is clear that the Legislature intended only to improve the statute's grammar, not to alter its underlying meaning." *Id.*[15]

In 1990, the *Preuss* Court refined the *Stoudemire* holding by clarifying that the prior offenses need not

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[14] The change was consistent throughout the habitual offender laws. For instance, before 1978, MCL 769.12 similarly stated: "A person who *after having been 3 times convicted* within this state, of felonies or attempts to commit felonies . . . ." (Emphasis added.)

[15] Justice CAVANAGH offers the puzzling assertions that "[t]here has been no change in the statutory language between 1940 and today that affects its inapplicability to 'different counts growing out of the same act,' " quoting *People v Podsiad,* 295 Mich 541, 547; 295 NW 257 (1940), and that we "fail[] to identify the changes in the language that would have had this effect." *Post* at 73 n 6, 77.

"be separated by intervening convictions or sentences," but it retained the rule "that a defendant's prior offenses must arise from separate incidents." *Preuss, supra* at 737. Specifically, by reference to the fourth offense habitual offender statute, the Court concluded that

> the statute does not require that a fourth offender's three prior convictions, the sentences for those convictions, or the offenses upon which those convictions and sentences are based, occur in any particular sequence. *The statute requires only that the fourth offense be preceded by three convictions of felony offenses, and that each of those three predicate felonies arise from separate criminal incidents*. [*Id.* at 717 (emphasis added).]

Preuss criticized the *Stoudemire* Court's "flawed" interpretation of Michigan's statutes, concluding that the *Stoudemire* Court had erred in its attempt to divine the intent underlying the New York statutes on which Michigan's statutes were modeled. *Id*. at 720, 727-731. For instance, *Preuss* observed that *Stoudemire* had "relied erroneously on the only New York decision that held that a fourth offender's second and third offenses must each follow conviction and sentence on the earlier offense." *Id.* at 727. Further, the *Preuss* Court opined that Senator Baumes's comments did not establish his intent "on the issue of the sequentiality of prior convictions." *Id.* at 729. Perhaps most significantly, the *Preuss* Court observed that, to the extent that Baumes's views suggested "that the fourth offense must follow *a completed sentence*," his views "conflict[ed] with the language of 1927 PA 175, which literally requires only that the commission of the fourth offense follow three prior 'convictions,' not sentences." *Id.* at 730 (emphasis in original).

Thus, the *Preuss* Court acknowledged that the unambiguous statutory language—"If a person has been convicted of any combination of 3 or more felonies or

attempts to commit felonies . . . and that person commits a subsequent felony"—refers only to the number of prior felony convictions and "implies that no particular sequence for the first three offenses or convictions was intended." *Id.* at 720-721, 730. Nonetheless, the Court chose to disregard this language, opining that "a literal reading of a statute may be modified if that reading leads to a clear or manifest contradiction of the apparent purpose of the act, or if necessary to correct an absurd and unjust result . . . ."[16] *Id.* at 721. Accordingly, the Court "turn[ed] to sources of legislative intent other than the language to determine whether declining to read into the statute a sequentiality requirement for predicate offenses would contradict the Legislature's purpose in enacting the statute." *Id.* at 721.

In doing so, the *Preuss* Court erred when it construed the *unambiguous* terms of the statute by reference to legislative history. *Weeder, supra* at 497. Ironically, not

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[16] Justice CAVANAGH incorrectly asserts that *Preuss* "found nothing in the amended language to compel a change in the longstanding requirement that 'multiple convictions arising out of a single incident may count as only a single prior conviction under the statute.' " *Post* at 78, quoting *Preuss, supra* at 720. To the contrary, both *Preuss* and *Stoudemire* recognized that the new language "arguably has a different import," *Stoudemire, supra* at 278, and "implies that no particular sequence for the first three offenses or convictions was intended." *Preuss, supra* at 721. But in each case, the Court avoided the plain meaning of the statutory text in favor of legislative history or on the basis of the Court's conclusion that the plain language of the text produced an absurd or unjust result. *Preuss, supra* at 721; *Stoudemire, supra* at 266, 271, 278.

There is no need to address the merits of the absurd results rule in this opinion. Even assuming the existence of such a rule of interpretation, the result reached here is by no means absurd. A reasonable lawmaker could easily have intended the result reached here. That is, such a lawmaker could easily have intended that courts count each separate felony conviction in determining habitual offender status. There is nothing at all absurd about treating a defendant who has been convicted of three felonies as a third offense habitual offender.

only did it reject the *Stoudemire* Court's attempt at the same task, but its opinion highlights the problems inherent in such attempts by offering a different judicial construction of the inconclusive "history" of the very same enactments.[17] Further, *Preuss* failed to grapple at all with the import of the 1978 revisions, relying instead—just as the Court had in *Stoudemire*—on its impressions of the Legislature's intent when adopting the original 1927 language. On the basis of these impressions, *Preuss* concluded that the "legislative history of the statute suggests that it was directed at the 'persistent' or 'repeat' offender." *Preuss, supra* at 738. Having reached this conclusion, the Court then interpreted the statute as if these words appeared in its text, stating:

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[17] Indeed, the *Preuss* Court itself proceeded to examine inconclusive statements from a report of the Commission of Inquiry Into Criminal Procedure. *Preuss, supra* at 721-722, citing State of Michigan, Report of the Commission of Inquiry Into Criminal Procedure (February 8, 1927). The Court noted the commission's desire to improve former repeat-offender statutes that imposed escalating punishments on the basis of preceding *punishments*. *Preuss*, *supra* at 722-723. The Court concluded that the commission's goals were to "make it tougher for criminals to avoid apprehension, conviction, and adequate punishment," to "apply [habitual offender enhancements] to a broader class of criminals than they would have applied to had the prior language about prior sentence been retained," and to "punish[] repeat offenders harshly." *Id.* at 724. Significantly, the Court acknowledged that the report "does not contain any express statement concerning the commission's intent regarding whether a defendant's prior convictions, offenses, or sentences must occur in any particular sequence in order for him to be subject to fourth-offender penalties." *Id.* at 722. Indeed, the new provision in its original 1927 form—which applied when an offender had been "three times convicted"—"literally applied to defendants who had previously been convicted three times before they committed their fourth offense, even if they had not yet been sentenced on any or all of those prior convictions." *Id.* at 724. Nonetheless, the Court cited the report, among other authorities, as evidence that the Legislature intended a same-incident test. *Id.* at 738.

> A common-sense interpretation of these phrases is that the Legislature did not have in mind the person who had only one criminal episode in which he managed to commit several different crimes. Instead, "repeat" suggests some time interval between crimes, and "persistent" suggests a criminal who continues in his criminal pursuits after these intervals. Neither of these concepts may easily be reconciled with an interpretation of the statute which would allow a court to impose fourth-offender penalties on a defendant whose three prior convictions arose out of the same criminal incident. [*Id*.]

We reject the approaches of both *Stoudemire* and *Preuss*, which run counter to principles of statutory construction. Indeed, in criticizing *Stoudemire,* the *Preuss* Court *reinterpreted* the very history on which *Stoudemire* relied and reached a different result. Thus, these two opinions exemplify the problems inherent in preferring judicial interpretation of legislative history to a plain reading of the unambiguous text. As we have stated, construing an unambiguous statute by relying on legislative history " '[a]t the very most . . . allows the reader, with equal plausibility, to pose a conclusion of his own that differs from that of the majority.' " *Donajkowski v Alpena Power Co,* 460 Mich 243, 259; 596 NW2d 574 (1999), quoting *Rogers v Detroit,* 457 Mich 125, 164; 579 NW2d 840 (1998) (TAYLOR, J., dissenting), which was overruled by *Robinson v Detroit,* 462 Mich 439 (2000).[18] Further, "not all legislative history is of

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[18] As perhaps best put by United States Supreme Court Justice Antonin Scalia,

> [c]ommittee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President . . . . It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they

equal value . . . ." *In re Certified Question,* 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). Some historical facts may allow courts to draw reasonable inferences about the Legislature's intent because the facts shed light on the Legislature's affirmative acts. For instance, we may consider that an enactment was intended to repudiate the judicial construction of a statute, or we may find it helpful to compare multiple drafts debated by the Legislature before settling on the language actually enacted. Other facts, however, such as staff analyses of legislation, are significantly less useful because they do not necessarily reflect the intent of the Legislature as a body. *Id.* Shifting interpretations of the intent of the New York Legislature—particularly as embodied in the comments of a single state senator—certainly fall into this latter category.

Significantly, defendant here essentially concedes that a proper interpretation of the habitual offender statutes precludes the use of a same-incident method for counting prior convictions. Defendant merely advances policy considerations and suggests that the Legislature has acquiesced to the interpretations of the statutes offered by this Court in *Stoudemire* in *Preuss.* But, as with attempts at divining legislative intent from legislative history, "legislative acquiescence is an exceedingly poor indicator of legislative intent." *Donajkowski, supra* at 258. Instead, "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words,* not from its silence." *Id.* at 261; see also *People v Hawkins,* 468 Mich 488, 507; 668 NW2d 602 (2003) ("As we have repeatedly stated, the 'legislative acquiescence' prin-

see from mirroring the policies they favor. [*Thompson v Thompson,* 484 US 174, 191-192; 108 S Ct 513; 98 L Ed 2d 512 (1988) (Scalia, J., concurring) (citations omitted).]

ciple of statutory construction has been squarely rejected by this Court because it reflects a critical misapprehension of the legislative process."). As we observed in *Donajkowski*, " '[c]ommentators have noted that one can posit myriad reasons explaining the Legislature's failure to correct an erroneous judicial decision . . . .' " *Donajkowski*, *supra* at 259, quoting *Rogers*, *supra* at 164 n 2 (TAYLOR, J., dissenting). Moreover, " 'it should not be assumed that the Legislature even agrees it has a duty to correct interpretations by the courts that it considers erroneous.' " *Donajkowski, supra* at 260, quoting *Rogers, supra* at 164-165 (TAYLOR, J., dissenting). Indeed, as Justice TAYLOR observed, " '[i]n *Autio v Proksch Construction Co*, 377 Mich 517, 527; 141 NW2d 81 (1966), Justice SOURIS described [the doctrine of legislative acquiescence] as "a pernicious evil designed to relieve a court of its duty of self-correction" . . . .' " *Donajkowski, supra* at 260, quoting *Rogers, supra* at 165 (TAYLOR, J., dissenting). See *Donajkowski, supra* at 258-262, for a full discussion.[19]

When the Legislature's language is clear, we are bound to follow its plain meaning. The Legislature is

[19] The dissenters would have us engage in a guessing game regarding the meaning of legislative silence. For instance, Justice CAVANAGH notes that, before Congress amended 18 USC 924(e)(1) to explicitly include a same-incident test, courts had already begun grafting such a test onto the statute. *Post* at 76-77. But we rarely know whether a legislature's intent in amending a statute reflects the intent it originally had when it enacted the statute. Indeed, when a conforming amendment occurs in the wake of a judicial decision, for all we know, the judicial decision may have sparked debate because some legislators perceived the decision as error, but the legislature may ultimately have concluded that the incorrect interpretation nonetheless reflected the better current policy. For these reasons, we decline to second-guess the Legislature when it has spoken unambiguously. It is not this Court's role to correct judicially perceived mistakes rooted in the Legislature's silence or inaction. To the contrary, our separate duty is to engage in *self*-correction when appropriate. *Donajkowski, supra* at 260.

fully capable of amending statutory language if it sees fit to do so. Indeed, legislatures throughout the country have enacted habitual offender statutes that explicitly include same-incident methods for counting prior felonies. Arizona's habitual offender laws, for instance, explicitly provide: "Convictions for two or more offenses *committed on the same occasion* shall be counted as only one conviction for purposes of this section." Ariz Rev Stat Ann 13-604(M) (emphasis added).[20] The California Penal Code provides that "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive . . . a five-year enhancement for each such prior conviction *on charges brought and tried separately*." Cal Penal Code 667(a)(1) (emphasis added). The Illinois habitual offender laws offer a particularly helpful comparison because the definition of habitual offender status includes general language somewhat similar to that in our own statutes:

> *Every person who has been twice convicted* in any state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class X felony, criminal sexual assault, aggravated kidnapping or first degree murder, and is thereafter convicted of a Class X felony, criminal sexual assault or first degree murder, committed after the 2 prior convictions, *shall be adjudged an habitual criminal*. [720 Ill Comp Stat 5/33B-1(a) (emphasis added).]

The statute also *explicitly* provides, however, that "[a]ny convictions *which result from or are connected with the same transaction, or result from offenses committed at the same time*, shall be counted for the

[20] See also Ariz Rev Stat Ann 13-604(S) ("A person who . . . stands convicted of a serious offense . . . , whether a completed or preparatory offense, and who has previously been convicted of two or more serious offenses *not committed on the same occasion* shall be sentenced to life imprisonment . . . .") (emphasis added).

purposes of this Section as one conviction." 720 Ill Comp Stat 5/33B-1(c) (emphasis added).[21]

For these reasons, we overrule *Stoudemire* and *Preuss*. "[S]tare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). Rather, if a case was incorrectly decided, we have a duty to reconsider whether it should remain controlling law. *Id.* at 464. In doing so, we "review whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Id.* These criteria weigh in favor of overruling *Stoudemire* and *Preuss*.

Most significantly, the same-incident test has not created reliance interests that will be thwarted by

[21] Also compare Mo Rev Stat 558.016(3) ("A 'persistent offender' is one who has pleaded guilty to or has been found guilty of two or more felonies *committed at different times*." (emphasis added); Okla Stat tit 21, § 51.1(B) ("Felony offenses relied upon shall not have arisen out of the *same transaction or occurrence or series of events closely related in time and location*." (emphasis added)); 18 USC 924(e)(1) (providing that under what was formerly titled the federal Armed Career Criminal Act, "[i]n the case of a person who violates [18 USC 922(g)] and has three previous convictions by any court referred to in [18 USC 922(g)(1)] for a violent felony or a serious drug offense, or both, *committed on occasions different from one another*, such person shall be fined under this title and imprisoned not less than fifteen years") (emphasis added).

These statutes exemplify other legislatures' use of plain language to establish same-incident tests. We note them in contrast to the text of Michigan's statutes. We do not "read positive meaning into Michigan legislative silence regarding, for instance, a Missouri statute," as Justice CAVANAGH suggests. *Post* at 76 n 10. Justice CAVANAGH has it backwards. The Legislature has spoken through its plain language, which we seek to uphold. It is defendant and our dissenting colleagues who wish to import a same-incident test where there is none, assuming that the Legislature's silence in the wake of *Stoudemire* and *Preuss* signifies approval of the test those cases added.

overruling *Stoudemire* and *Preuss;* overruling these cases will not cause "significant dislocations" or frustrate citizens' attempts to conform their conduct to the law. See *id*. at 466-467. "[T]o have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Id.* at 467. The nature of a criminal act defies any argument that offenders attempt to conform their crimes—which by definition violate societal and statutory norms—to a legal test established by *Stoudemire* and *Preuss*. Moreover, to the extent that these cases implicate reliance interests, such interests weigh in favor of overruling them. Michigan citizens and prosecutors should be able to read the clear words of the statutes and "expect . . . that they will be carried out by all in society, including the courts." *Id.*

> In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. [*Id.*]

We also note that the factor of practical workability bears little on our decision to overrule our previous erroneous interpretations of the habitual offender laws. The Legislature's clear directive to count each felony is no less workable—and indeed is arguably simpler to apply in practice—than the current, judicially imposed same-incident rule.

IV. RESPONSE TO THE DISSENTS

Justice CAVANAGH concedes that our interpretation "may, arguably, be supported by the language of the habitual-offender statutes . . . ." *Post* at 73. But his

arguments are rooted in his assertion that there are "competing, arguably plausible interpretations . . . ."[22] *Post* at 74. He then concludes that, because purported competing interpretations are possible, it is appropriate to consult legislative history and apply the rule of lenity. *Post* at 75-76. To the contrary, as we have explained and as defendant essentially concedes, there is nothing textually ambiguous about the Legislature's directive to apply habitual offender sentencing laws when "a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies . . . ." MCL 769.11(1).

In his only argument based on the text of the statute, Justice CAVANAGH asserts that the statute's use of the phrase "subsequent felony" indicates that enhancement does not apply to simultaneous criminal acts. *Post* at 72.[23] We agree that, if an offender is convicted and sentenced for two simultaneous felonies, neither simultaneous conviction may be used to enhance the sentence for the other under the habitual offender statutes. But Justice CAVANAGH's extension of this point to imply a same-incident test misinterprets the statute's use of the word "subsequent." "Subsequent" describes the sequential relationship between the sentencing felony and the prior convictions ("If a person has been convicted of any combination of . . . felonies or attempts to commit felonies . . . and that person *commits a subsequent felony*. . . ."). "Subsequent" does not describe a relationship *among* the prior convictions.

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[22] Justice KELLY similarly opines that "the language of the habitual offender statutes is at least equally supportive of the conclusion that the statues are inapplicable to multiple convictions arising from the same act." *Post* at 86.

[23] Justice KELLY cites Justice CAVANAGH on this point. *Post* at 86 n 24.

Justice CAVANAGH also purports to rely on "this Court's consistent statements concerning the purpose of the habitual-offender statutes." *Post* at 73. He cites cases from 1929, the 1940s, and, most recently, 1970 and 1976. *Post* at 70, 73 n 6, and 73. Yet, as Justice CAVANAGH acknowledges, the Legislature amended the statutes in 1978. 1978 PA 77. He ignores the import of the 1978 revisions, as did the Court in *Stoudemire* and *Preuss*. Thus, he urges that "in more than 150 years, no Michigan court has ever held, until today, that convictions for multiple crimes committed in a single criminal transaction count as separate convictions for habitual-offender purposes." *Post* at 78, citing *People v Palm,* 245 Mich 396, 400; 223 NW 67 (1929). Justice KELLY similarly opines that the "1978 amendments did not alter the command that 'multiple convictions arising out of a single incident may count as only a single prior conviction under the statute . . . .' " *Post* at 86. But, instead of explaining this conclusory statement, she merely cites *Preuss*. *Post* at 86-87.

We reject the dissents' suggestions that this Court should divine legislative intent not from the Legislature's enactments, but from precedent of this Court that preexisted those enactments. Indeed, this Court addressed this very reasoning when we overruled *Dedes v Asch,* 446 Mich 99; 521 NW2d 488 (1994), in *Robinson*. We explained:

> The majority in *Dedes* interpreted the phrase "the proximate cause" to mean "a proximate cause." It did this on the basis of an analysis that not to do so would produce a marked change in Michigan law, and that the Legislature, in its "legislative history," gave no indication that it understood that it was making such a significant change. This approach can best be described as a judicial theory of legislative befuddlement. Stripped to its essence, it is an endeavor by the Court to use the statute's "history" to

> contradict the statute's clear terms. We believe the Court had no authority to do this. [*Robinson, supra* at 459-460.]

The Legislature has no duty to satisfy us that its legislative enactment is a "good" one. Legislation must be constitutional; this alone is enough. Once the Legislature has cleared the hurdle of constitutionality, we are to treat its enactment as law. When, as here, the text enacted by the Legislature and signed by the Governor is unambiguous, our duty is to uphold its plain meaning.

Both dissents' analyses would essentially require the Legislature to explain to this Court's satisfaction its reasons for changing the statutory text. The Legislature has no such duty to us and, because its text is clear, it is irrelevant whether the legislators concluded that this Court misinterpreted the pre-1978 statutes in its previous decisions or, instead, that a new policy for counting prior felonies was preferable. Significantly, various legislators' reasons for enacting the text may have differed and may have been rooted in either of these conclusions. But their agreed-on choice of language is controlling. If that language is perfectly forthright, our task is simply to implement it. We reject the implications of the dissents' views, which would ultimately require the Legislature, when amending laws, to add redundant explanations for its otherwise plain language such as: "By X, we mean X. We do not mean the Supreme Court's previous interpretations of Y."

We express no opinion regarding the correctness of any court's interpretations of the pre-1978 versions of the statutes. Questions concerning earlier versions of the text are not before us. Moreover, to whatever extent courts correctly divined past legislatures' intents using previously enacted language, those intents should not guide our interpretation of the *unambiguous* language

of the current versions of the statutes; the acts of past legislatures do not bind the power of successive legislatures to enact, amend, or repeal legislation. *Studier v Michigan Pub School Employees' Retirement Bd,* 472 Mich 642, 660; 698 NW2d 350 (2005). In this case, we acknowledge the Legislature's explicit changes to the statutory language and, in doing so, by no means do we employ "a new view of statutory interpretation," as Justice CAVANAGH contends. *Post* at 78 n 12. To the contrary, we consider the statute's plain language, and it is difficult to imagine how the Legislature could possibly have written the statute to more clearly indicate that all prior convictions count than by stating that "[i]f a person has been convicted of *any combination of* 2 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony within this state, the person shall be punished [as provided in this section]." MCL 769.11(1) (emphasis added).

Significantly, Justice CAVANAGH's central contention is that the habitual offender statutes "are plainly intended to apply to habitual offenders, individuals who persist in criminal activity regardless of their prior convictions." *Post* at 70. But the goal of punishing persistent offenders by no means requires a same-incident test. Rather, the Legislature apparently and reasonably saw fit to punish an offender who has committed multiple prior felonies in a harsher manner than an offender who has committed only a single prior felony. We see no reason why the Legislature may not punish persistence by discriminating in a graduated fashion among those who have committed a single prior felony, MCL 769.10, those who have committed two prior felonies, MCL 769.11, and those who have committed three or more prior felonies, MCL 769.12, regardless of whether the offender committed the prior felonies on a single occasion. In sum, Justice CAVANAGH's analysis is fundamentally flawed because it offers a judi-

cial construction to deconstruct an unambiguous statute. Nothing about the statute's text renders it susceptible to multiple interpretations and, therefore, judicial "construction" is not even permissible. Further, Justice CAVANAGH repeats the mistakes of the Court in *Stoudemire* and *Preuss* by dismissing the 1978 revisions of the habitual offender laws and, instead, relying on debatable legislative history and court cases addressing the previous versions of the statutes.

Finally, Justice KELLY's exegesis of the doctrine of stare decisis misses the mark. As we have already discussed, the recent *Stoudemire* and *Preuss* decisions are not part of a long line of cases interpreting identical statutory language; rather, *Stoudemire* and *Preuss* purported to interpret the post-1978 language. Moreover, the *Stoudemire* and *Preuss* decisions are *themselves* inconsistent precedents. Justice KELLY would maintain *Preuss* as stare decisis because it is workable, free from absurdity, "not mischievous in practice," and no changes in the law or facts undermine it. *Post* at 89. But the same things can be said of *Stoudemire*. Accordingly, the heart of Justice KELLY's analysis contradicts her preference for *Preuss*, which itself overruled *Stoudemire* in part. Indeed, as we have thoroughly discussed, *Preuss* exemplifies the need for adhering to plain statutory language instead of upholding precedent merely for precedent's sake. The *Preuss* Court followed *Stoudemire* in choosing to avoid the plain statutory text. *Stoudemire, supra* at 278; *Preuss, supra* at 720-721. But *Preuss* then overruled *Stoudemire* in part after selectively reinterpreting other states' caselaw, comments by legislators, and committee reports addressing the original 1927 Michigan act and the prior New York act. For these reasons, upholding *Preuss* certainly would not serve to " 'avoid an arbitrary discretion in

the courts . . . .' " *Post* at 81, quoting The Federalist No. 78, p 471 (Alexander Hamilton) (Clinton Rossiter ed, 1961). To the contrary, binding the Court to "strict rules"—such as the tenets of statutory interpretation —avoids arbitrariness.[24] *Post* at 81. Moreover, as we have explained, there is nothing "destabilizing" about today's decision under *Robinson* or otherwise. See *post* at 80, 82. No undue hardship will result because of reliance on our previous holdings, nor will we frustrate citizens' attempts to conform their conduct to the law. *Robinson, supra* at 464, 466-467. In the unlikely event that those who would commit additional felonies in this state laid plans for future crime in reliance on receiving less punishment than the plain language of the habitual offender statutes prescribes, Justice KELLY correctly assumes that such reliance garners little sympathy in our eyes. *Post* at 82-83 n 11.

V. CONCLUSION

Michigan's habitual offender laws clearly contemplate counting *each* prior felony conviction separately. The text of those laws does not include a same-incident test. This Court erred by judicially engrafting such a test onto the unambiguous statutory language. Accordingly, we overrule *Preuss* and *Stoudemire.*

Defendant was properly sentenced as a third offense habitual offender because he "ha[d] been convicted of . . . 2 or more felonies . . . and commit[ted] a subsequent felony within this state . . . ." MCL 769.11(1). Because defendant was properly sentenced, resentencing is not required on the basis of his claim that he

[24] Concerning Justice KELLY's criticisms of the majority for its supposed "disregard" for the doctrine of stare decisis, we reference the concurring statement of Justice MARKMAN in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 223; 731 NW2d 41 (2007).

received ineffective assistance of counsel. When an attorney fails to raise "an objection that would have been supported by a decision which subsequently was overruled," a defendant cannot show that he was prejudiced within the meaning of *Strickland*. *Lockhart v Fretwell,* 506 US 364, 366; 113 S Ct 838; 122 L Ed 2d 180 (1993). Under these circumstances, a focus on "mere outcome determination" is insufficient because the result of the proceeding is not fundamentally unfair or unreliable. *Id.* at 369. "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at 369-370, citing *United States v Cronic,* 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Accordingly, we affirm defendant's sentences. We deny leave to appeal with respect to defendant's remaining issues because he has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

WEAVER, J. (*concurring in result only*). I concur with the result of majority opinion that defendant need not be resentenced. In this case, defendant did not suffer any material injustice. Any error in defendant's sentencing constituted harmless error.

CAVANAGH, J. (*dissenting*). This case considers the scope of Michigan's habitual-offender statutes, MCL 769.10, 769.11, 769.12, and 769.13. Because I believe this Court has, until today, properly understood legislative intent and properly applied the habitual-offender

statutes to persons who persist in crime after having been convicted, I respectfully dissent.

The habitual-offender statutes, enhancing punishment for subsequent convictions, are plainly intended to apply to habitual offenders, individuals who persist in criminal activity regardless of their prior convictions. Defendant was sentenced under MCL 769.11(1) as a third-offense habitual offender. Defendant argues, and the prosecution does not contest, that the two underlying felonies supporting this sentence enhancement arose from the same criminal incident. In fact, there could not be a clearer case of felonies arising from the same criminal incident; the two prior convictions of possession of a firearm during the commission of a felony and felonious assault arose from the very same act committed on April 11, 1987.

Applying both of these convictions as predicates for a third-offense habitual-offender sentence enhancement would be invalid under *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990), *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), and the uniform holdings of this Court since the Legislature enacted the habitual-offender statutes in 1927.[1] *Preuss* held that, for purposes of the habitual-offender statutes, each of the predicate felony convictions must "arise from separate criminal incidents."[2] *Preuss,* 436 Mich at 717. *Preuss* affirmed the same holding found not only in *Stou-*

[1] The current habitual-offender statutes were enacted as 1927 PA 175. The relevant language was last amended by 1978 PA 77. However, in *People v Palm*, 245 Mich 396, 400; 223 NW 67 (1929), this Court observed that habitual-offender sentence enhancement was not "new" in this state; such statutes have been in force since 1857. This Court has never, until today, held that such statutes apply to multiple offenses committed on one occasion.

[2] *Preuss* specifically addressed MCL 769.12, the habitual-offender statute addressing three or more prior convictions, but that decision

demire, but also in *People v Podsiad*, 295 Mich 541, 547; 295 NW 257 (1940) (stating that the habitual-offender statutes are "inapplicable to convictions on different counts growing out of the same act"), and *People v Lowenstein*, 309 Mich 94, 100-101; 14 NW2d 794 (1944) (holding that multiple convictions from the same criminal transaction did not subject the defendant to additional punishment under the habitual-offender statutes). Clearly, the present defendant's two previous felony convictions, arising from the same act, do not arise from separate criminal incidents. Under *Preuss*, defendant would be subject to sentence enhancement as a second-offense habitual offender, not as a third-offense habitual offender.

The majority overrules *Preuss*. *Ante* at 44. The majority asserts that this Court has failed to understand the language of the habitual-offender statutes since such statutes were enacted and, thus, incorrectly failed to count multiple offenses toward habitual-offender sentence enhancement. I disagree.

The language of MCL 769.11(1), and the statutory system of which it is a part, indicates that the Legislature intended to require that predicate felonies for habitual-offender sentencing arise from separate criminal incidents. "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953). MCL 769.10 is the first in a series of three statutes in the Code of Criminal Procedure that together allow enhanced penalties on an

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applies to all three statutes specifying sentence enhancements in the common scheme of the habitual-offender statutes.

increasing scale for an offender's second,[3] third,[4] and fourth[5] offenses. MCL 769.10 states that "[i]f a person has been convicted of a felony . . . and that person commits a *subsequent* felony," then that person is subject to a second-offense enhancement. (Emphasis added.) MCL 769.11 states that "[i]f a person has been convicted of any combination of 2 or more felonies . . . and that person commits a *subsequent* felony," then that person is subject to what is usually termed a third-offense enhancement. (Emphasis added.) Finally, MCL 769.12 states that "[i]f a person has been convicted of any combination of 3 or more felonies . . . and that person commits a *subsequent* felony," then that person is subject to what is usually termed a fourth-offense enhancement. (Emphasis added.)

This system of graduated enhancements for *subsequent* felonies clearly indicates that the Legislature did not intend habitual-offender sentence enhancement to apply to *simultaneous* criminal acts. As this Court long ago recognized, "[i]t is obvious that the [provisions of the habitual-offender statutes] relate to convictions for *subsequent* felonies. They apply only to persons who, after having been convicted of one felony, commit an

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[3] Section 10 of chapter IX of the Code of Criminal Procedure applies to a second offense and allows a sentence enhancement of no more than "1½ times the longest term prescribed for a first conviction" of an offense otherwise punishable by less than life imprisonment. MCL 769.10(1)(a). See also MCL 777.21(3)(a).

[4] Section 11 of chapter IX of the Code of Criminal Procedure applies to a third or higher offense and allows a sentence enhancement of up to twice the longest term otherwise allowed for an offense punishable by less than life imprisonment. MCL 769.11(1)(a). See also MCL 777.21(3)(b).

[5] Section 12 of chapter IX of the Code of Criminal Procedure applies to a fourth or higher offense and allows a sentence enhancement of up to life imprisonment for offenses otherwise punishable by imprisonment for five years or more. MCL 769.12(1)(a). See also MCL 777.21(3)(c).

additional crime, and are inapplicable to convictions on different counts growing out of the same act." *Podsiad*, 295 Mich at 546-547 (emphasis added).[6]

In this case, defendant could not have been sentenced as a second-offense habitual offender when he was first convicted of the two underlying crimes committed at the same time. But now, without intervening convictions, defendant has been sentenced as a third-offense habitual offender because of simultaneous, not subsequent, convictions. The majority interprets the habitual-offender statutes as applying to multiple, simultaneous convictions. While this interpretation may, arguably, be supported by the language of the habitual-offender statutes, this Court's longstanding, uniform interpretation is at least equally supported by the language of the statutes. I find the latter more convincing in light of the plain language of the habitual-offender statutes, the overall sentencing system prescribed by the Legislature, and legislative history.

The requirement that predicate felonies arise from separate criminal incidents is supported by this Court's consistent statements concerning the purpose of the habitual-offender statutes. The statutes increase punishment because of a person's " 'apparent persistence in the commission of crime . . . .' " *People v Hendrick*, 398 Mich 410, 416; 247 NW2d 840 (1976), quoting *People v Palm*, 245 Mich 396, 401; 223 NW 67 (1929). "The habitual criminal act was passed to provide a punishment for repeated commissions of felonies." *In re*

[6] The majority disagrees that the graduated enhancement scheme of the habitual-offender statutes implies that they are "inapplicable to convictions on different counts growing out of the same act." *Podsiad*, *supra* at 547. But *Podsiad*, decided in 1940, demonstrates that this is hardly a novel understanding of the statutory scheme. There has been no change in the statutory language between 1940 and today that affects its inapplicability to "different counts growing out of the same act."

Southard, 298 Mich 75, 78; 298 NW 457 (1941).[7] Obviously, persistence and repetition are not apparent when two convictions arise simultaneously from a single act.

This Court's statements on the legislative intent behind the habitual-offender statutes have relied, to one degree or another, on legislative history. The majority denounces legislative history as a means of statutory construction. The majority implies that, by use of legislative history, a statute can be made to say whatever its interpreter wishes it to say. *Ante* at 56-58. If this were so, one imagines the majority could marshal evidence from legislative history supporting its interpretation of MCL 769.11. The majority cannot. Such evidence does not exist. The uniform evidence from legislative history supports the rule of *Preuss*, that crimes committed in a single criminal incident are counted as one for the purposes of the habitual-offender statutes.

The United States Supreme Court does not share the majority's dim view of consulting legislative history when there are competing, arguably plausible interpretations of a statute.[8] *Taylor v United States*, 495 US 575;

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[7] See also *Palm*, 245 Mich at 401 (stating that the basis for sustaining the habitual-offender statutes is that " 'the Legislature may require the courts to take into consideration the persistence of the defendant in his criminal course' ") (citation omitted), *Lowenstein,* 309 Mich at 100-101 (stating that "the fact that defendant was convicted and sentenced on both counts" does not "result in conviction for two felonies such as to subject the defendant to additional punishment under the habitual criminal act"), and *People v Hatt*, 384 Mich 302, 306-307; 181 NW2d 912 (1970) (stating that the "only purpose of [the habitual-offender statutes] is to impose a longer sentence because of the apparent persistence by the defendant in the commission of acts of a criminal nature").

[8] See, e.g., *Safeco Ins Co of America v Burr*, 551 US 47; 127 S Ct 2201; 167 L Ed 2d 1045 (2007) (extensively reviewing legislative history of the Fair Credit Reporting Act); *Ledbetter v Goodyear Tire & Rubber Co, Inc*, 550 US 618; 127 S Ct 2162; 167 L Ed 2d 982 (2007) (referring to legislative

110 S Ct 2143; 109 L Ed 2d 607 (1990), is the seminal case interpreting the scope of what was formerly called the Armed Career Criminals Act (ACCA), specifically 18 USC 924(e), a federal analog of MCL 769.11 involving firearms offenses. In *Taylor*, the Supreme Court identified plausible alternative interpretations of the scope of certain statutory language in a particular provision of the ACCA. The Court then stated: "Before examining these [plausible, alternative interpretations], we think it helpful to review the background of [18 USC 924(e)]." *Id.* at 581. The Court then conducted a rigorous review of legislative history related to the statutory language in question. *Id.* at 581-590.

I agree with the United States Supreme Court: legislative history should not be ignored when it may illuminate a court considering reasonable, alternative interpretations of a statute. Where, as here, legislative history singularly supports one arguably reasonable interpretation of a statute over another, it is a worthy guide to the proper choice between the interpretations.[9] The former interpretation of MCL 769.11, given by this Court from the enactment of the law in 1927 to today, is

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history of title VII of the Civil Rights Act of 1964). In *Wilkie v Robbins*, 551 US 537, ___; 127 S Ct 2588, 2606 n 12; 168 L Ed 2d 389 (2007), the Court stated that "we know that Congress patterned the [Hobbs] Act after two sources of law: 'the Penal Code of New York and the Field Code, a 19th-century model penal code.' " (Citations omitted.) This legislative history regarding the statutory sources offered insight to the Court, just as it did for this Court in *Stoudemire* (likewise reviewing the background of Michigan habitual-offender laws adapted from the New York penal code).

[9] While legislative history may support several legislative intentions directed toward those individuals targeted by the habitual-offender statutes—punishment, removal from society, or rehabilitation—there is no such diversity regarding the identity of the individuals to whom the statutes are meant to apply. Uniformly, the evident intent is to target habitual offenders, those who persist in criminal activity despite prior convictions.

reasonable. It is supported by the language of the statute. It is also uniformly supported by legislative history.

Further, when there are plausible, competing interpretations of a criminal statute, the rule of lenity should apply. " '[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.' " *Scheidler v Nat'l Org for Women, Inc*, 537 US 393, 409; 123 S Ct 1057; 154 L Ed 2d 991 (2003), quoting *McNally v United States,* 483 US 350, 359-360; 107 S Ct 2875; 97 L Ed 2d 292 (1987). In other words, when there are two plausible meanings, the more lenient should apply when years of a person's life are at stake. The majority isolates a statute outside its clear statutory scheme to arrive at the harsher result. But even if the majority's interpretation is plausible, the rule of lenity should apply, and the rule of *Preuss*, expressing the consistent holdings of this Court, should stand.

The majority lists several statutes from other jurisdictions as examples of habitual-offender statutes with language clearly requiring that predicate felonies arise from separate criminal episodes.[10] *Ante* at 60-61. Among these is the ACCA, a federal habitual-offender statute, as mentioned. The majority notes that the federal statute contains express language stating that predicate

[10] The majority asserts that these statutes from other states indicate that the Michigan Legislature "is fully capable of amending its language if it sees fit to do so." *Ante* at 59-60. The majority would read positive meaning into Michigan legislative silence regarding, for instance, a Missouri statute, but refuses to do so in light of decades of settled Michigan law. The Michigan Legislature may well have remained silent because no Michigan court until today has ever held that multiple convictions arising from the same act count as multiple offenses for purposes of habitual-offender enhancement.

felonies must be "committed on occasions different from one another . . . ." 18 USC 924(e)(1). What the majority fails to observe is that at the time the United States Supreme Court implied, and the United States Court of Appeals for the Eighth Circuit held, that predicate felonies used under federal habitual-offender statutes must be committed on occasions different from one another, *the statute did not expressly say that*. Rather, the courts reviewed legislative history to conclude that this must be the meaning of the statute. Congress amended the statute *after* the courts so held, and, in fact, Congress relied on the court rulings to so amend the statute.[11]

The majority repeatedly implies that changes in the statutory language have altered the habitual-offender statutes to the extent that they now apply to crimes committed during the same criminal transaction, but the majority fails to identify the changes in the language that would have had this effect. That is because there are no such changes or language. The 1978 statutory revisions relate to the time of conviction; they do not relate to the timing of the commission of the underlying crimes.

In *Preuss*, we reviewed the 1927 and the 1978 statutory language. We concluded that the language, both before and after amendment, required only that the defendant have been convicted of a felony before commission of the crime for which the enhanced sentence was being imposed. We revised *Stoudemire*'s holding that the sentence for a previous crime must have been

[11] See *Petty v United States*, 481 US 1034 (1987), *United States v Petty*, 828 F2d 2 (CA 8, 1987), *United States v Petty*, 798 F2d 1157 (CA 8, 1986), and 134 Cong Rec S17360, 17370 (daily ed November 10, 1988). For a history of this development, see also *United States v McElyea*, 158 F3d 1016, 1018-1020 (CA 9, 1998); *Stoudemire*, 429 Mich at 275-276.

completed before that crime could be used in counting predicate felony convictions. Thus, analyzing MCL 769.12, we stated that the statute applies "to defendants who had previously been convicted three times before they committed their fourth offense, even if they had not yet been sentenced on any or all of those prior convictions." *Preuss,* 436 Mich at 724. Yet we found nothing in the amended language to compel a change in the longstanding requirement that "multiple convictions arising out of a single incident may count as only a single prior conviction under the statute." *Id.* at 720.

The amended language does not relate to the timing of the commission of the underlying crimes; it relates only to the timing of the convictions for them. The majority does not show precisely how the amended language relates to the timing of the commission of previous crimes. The majority's overruling of a century and a half of Michigan jurisprudence is not based on the 1978 revisions.[12] Again, in more than 150 years, no Michigan court has ever held, until today, that convictions for multiple crimes committed in a single criminal transaction count as separate convictions for habitual-offender purposes. See *Palm*, 245 Mich at 400.

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[12] It appears that the majority is driven by a new view of statutory interpretation,

> [b]ut even were we to posit for argument's sake that changes in interpretive approach take place from time to time, we could not agree that the existence of such a change would justify reexamination of well-established prior law. Principles of *stare decisis,* after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends. [*CBOCS West, Inc v Humphries*, ___ US ___, ___; 128 S Ct 1951; 170 L Ed 2d 864 (2008).]

The majority asserts that its ruling is "arguably simpler to apply in practice" than the longstanding same-incident rule. *Ante* at 62. While it may be true that it is easier to count multiple felonies than to discern whether prior convictions arose from a single criminal incident, that does not mean that the Legislature intended the habitual-offender statutes to apply in that manner. Further, the longstanding rule that convictions arising from the same incident be counted as one conviction for habitual-offender purposes has not proved difficult to interpret or particularly susceptible to judicial discretion.[13] The rule has been workable since the statutes were enacted.

The defendant in this case has been sentenced to imprisonment for five years as a second-offense felony-firearm offender. MCL 750.227b(1).[14] His simultaneous crimes have been counted for purposes of extending his sentence. Defendant will spend years, if not a lifetime, in prison. But defendant should be subject to further sentence enhancement as a second-offense, not a third-offense, habitual offender. The habitual-offender stat-

[13] I find the majority's concern regarding judicial discretion somewhat puzzling because, as the majority observes, the statutes themselves give courts and prosecutors broad discretion in when and how they apply. Giving notice of the intent to seek a sentence enhancement for a defendant who is an habitual offender is at the discretion of the prosecutor. See MCL 769.13(1). Imposing a sentence enhancement is discretionary for the sentencing court. See MCL 769.10(1)(a) and (b); MCL 769.11(1)(a) and (b); MCL 769.12(1)(a) and (b).

[14] MCL 750.227b(1) states that a

> person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

utes apply to subsequent, not simultaneous, felonies. The statutes are intended to enhance the sentences of persistent criminals, not multiple offenders. Defendant's 25-year minimum sentence is within the recommended minimum sentence range for a second-offense habitual offender, but, because the sentencing court incorrectly counted separate convictions arising from the same criminal incident, in fact arising from the same act, resentencing is required. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). I would not overrule *Preuss* and the uniform holdings of this Court that *Preuss* represents. I would remand this case to the sentencing court for it to impose a sentence on defendant as a second-offense habitual offender.

KELLY, J., concurred with CAVANAGH, J.

KELLY, J. (*dissenting*). This is another case in which the majority disregards the doctrine of stare decisis. I join Justice CAVANAGH's well-reasoned dissent. I write separately to strongly disapprove of the majority's efforts to overturn all caselaw with which it disagrees, however destabilizing the effect may be. This is not a new area of contention among us. I have previously argued that the majority's willingness to overrule precedent weakens our legal system at its foundation.[1] Because of the importance of the issue, it warrants continuing attention.[2]

I agree with Justice CAVANAGH that *People v Preuss* and its antecedents correctly held that "multiple con-

[1] See, e.g., *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 253-257; 731 NW2d 41 (2007) (KELLY, J., concurring in part and dissenting in part).

[2] See *Welch v Texas Dep't of Hwys & Pub Transportation*, 483 US 468, 494; 107 S Ct 2941; 97 L Ed 2d 389 (1987) (opinion of Powell, J.) ("[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law.").

victions arising out of a single incident may count as only a single prior conviction under the statute . . . ."[3] Obviously, I would not overrule that line of decisions. Yet, aside from this basic disagreement, I am concerned that the majority's approach to the doctrine of stare decicis tends to turn it on its ear. The majority correctly observes that stare decisis should not be mechanically applied to prevent the overruling of previous caselaw. Then it errs by moving in the opposite direction. In contravention of the purpose of the doctrine, it mechanically applies stare decisis to permit the overruling of every case it believes was incorrectly decided.

Stare decisis is short for *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm." It has been a part of American jurisprudence since the country was founded.[4] Alexander Hamilton wrote that to "avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ."[5] Early in the twentieth century, Justice (then-Judge) Cardozo wrote that the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[6]

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[3] *People v Preuss*, 436 Mich 714, 720; 461 NW2d 703 (1990).

[4] The doctrine can be traced back to medieval England. Healy, *Stare decisis as a constitutional requirement*, 104 W Va L R 43, 56-62 (2001). It assumed its modern form in the late eighteenth and early nineteenth centuries. *Id.* at 55.

[5] The Federalist No. 78, p 471 (Alexander Hamilton) (Clinton Rossiter ed, 1961).

[6] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p 149.

The present majority on this Court has adopted what are commonly known as the "*Robinson* factors" to discern whether precedent should be overruled.[7] "In determining whether to overrule a prior case, this Court first considers whether the earlier case was wrongly decided."[8] But that is only the first step that must be taken. The Court must then examine (1) whether the decision remains workable, (2) the degree of reliance on the decision, and (3) whether changes in the law or facts have undermined the basis of the decision.[9] While this analysis appears straightforward, applying it can be difficult.

First, as demonstrated by the instant case, the justices of this Court often disagree about whether a previous decision was incorrectly decided. Yet, in this Court's post-*Robinson* cases, if a majority concludes that the previous decision was wrong, it will likely be overruled.[10] The remainder of the *Robinson* analysis appears to be gratuitous. For instance, in the area of criminal law, the majority has held that reliance interests simply are not implicated.[11] In addition, the major-

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[7] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

[8] *Rowland*, 477 Mich at 214, citing *Robinson*, 462 Mich at 463-468.

[9] *Robinson*, 462 Mich at 464.

[10] See, e.g., *Rowland*, 477 Mich at 215 n 13 (stating that the *Robinson* factors did not counsel *against* overruling precedent); *Paige v Sterling Hts*, 476 Mich 495, 512 n 21; 720 NW2d 219 (2006) (stating that "the only instances in which we might *decline* to overrule [erroneous precedent]" is when doing so would produce chaos) (emphasis added); *People v Nutt*, 469 Mich 565, 591; 677 NW2d 1 (2004) (concluding that the Court is *compelled* to overrule erroneous precedent); *People v Hickman*, 470 Mich 602, 610 n 6; 684 NW2d 267 (2004) (noting that no special justification is necessary to overrule erroneous precedent); *People v Petit*, 466 Mich 624, 633-634; 648 NW2d 193 (2002) (stating that courts *should* overturn erroneous decisions).

[11] *Ante* at 62; see also *People v Kazmierczak*, 461 Mich 411, 425; 605 NW2d 667 (2000) (implying that reliance is not worthy of "sympathy" in

ity often merges the reliance prong with the initial determination of whether the precedent was correctly decided. This last point effectively eviscerates the reliance prong of the *Robinson* analysis, because a "wrong" decision supposedly can never generate reliance.[12] The predictable result of the majority's current approach is that, once a party meets its initial burden of demonstrating that a prior decision was wrong, the precedent is overturned.

This result flies in the face of the doctrine of stare decisis. Key to the doctrine is the concept that some precedent should be upheld notwithstanding its flaws.[13]

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the criminal context). The majority fails to recognize that criminals are not the only people who rely on criminal statutes. For instance, legislators appropriate funds for the Department of Corrections on the basis of predictions of how many individuals will be incarcerated. The majority's new interpretation of the habitual offender statutes could render previous calculations inaccurate and appropriations insufficient because criminals will now be subject to lengthier prison terms.

[12] See *Pohutski v City of Allen Park*, 465 Mich 675, 694; 641 NW2d 219 (2002), quoting *Robinson*, 462 Mich at 467 (" '[S]hould a court confound . . . legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction.' ").

[13] See *Hubbard v United States*, 514 US 695, 716; 115 S Ct 1754; 131 L Ed 2d 779 (1995) (Scalia, J., concurring in part) (stating that the decision to overrule must be supported by "reasons that go beyond mere demonstration that the overruled opinion was wrong [otherwise the doctrine would be no doctrine at all]"); *Allied-Bruce Terminix Cos, Inc v Dobson*, 513 US 265, 283-284; 115 S Ct 834; 130 L Ed 2d 753 (1995) (O'Connor, J., concurring) (reiterating her view that the majority had been wrong in deciding the same issue in a previous case but joining the majority in this case because there was no special justification to overrule it); *Mathews v United States*, 485 US 58, 66-67; 108 S Ct 883; 99 L Ed 2d 54 (1988) (Brennan, J., concurring) ("I write separately only because I have previously joined or written four opinions dissenting from this Court's holdings that the defendant's predisposition is relevant to the entrapment defense. . . . Were I judging on a clean slate, I would still be inclined

As stated by Justice Brandeis: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[14]

Relying on caselaw from the United States Supreme Court, many commentators suggest that there exists a hierarchy of precedents. Under this hierarchy, stare decisis applies differently to different areas of the law.[15] The hierarchy approach gives the greatest weight to statutory precedents.[16] It states that caselaw interpreting statutes should rarely be overturned because the Legislature is the appropriate branch of government to correct an erroneous interpretation.[17]

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to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore, I bow to stare decisis . . . ."); *Scott v Illinois*, 440 US 367, 374-375; 99 S Ct 1158; 59 L Ed 2d 383 (1979) (Powell, J., concurring) ("Despite my continuing reservations about the *Argersinger* rule, it was approved by the Court in the 1972 opinion and four justices have reaffirmed it today. It is important that this Court provide clear guidance to the hundreds of courts across the country that confront this problem daily. Accordingly, and mindful of *stare decisis*, I join the opinion of the Court.").

[14] *Burnet v Coronado Oil & Gas Co*, 285 US 393, 406; 52 S Ct 443; 76 L Ed 815 (1932) (Brandeis, J., dissenting).

[15] See, e.g., Sinclair, *Precedent, super-precedent*, 14 Geo Mason L R 363, 368-370 (2007); Sellers, *The doctrine of precedent in the United States of America*, 54 Am J Comp L 67, 68-69, 84-85 (Supp, 2006); Eskridge, *Overruling statutory precedents*, 76 Geo L J 1361, 1362-1363 (1988); Barrett, *Statutory stare decisis in the courts of appeals*, 73 Geo Wash L R 317 (2005).

[16] *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996); *Patterson v McLean Credit Union*, 491 US 164, 172-173; 109 S Ct 2363; 105 L Ed 2d 132 (1989); *Illinois Brick Co v Illinois*, 431 US 720, 736; 97 S Ct 2061; 52 L Ed 2d 707 (1977); see also Fisher, *Statutory construction: Keeping a respectful eye on Congress*, 53 SMU L R 49, 51-52 (2000); Barrett, 73 Geo Wash L R at 320-321 (2005).

[17] As stated by the United States Supreme Court: "Considerations of *stare decisis* have special force in the area of statutory interpretation, for

Even if one rejects the hierarchy approach, the overruling of precedent requires some special justification.[18] The current majority of the Michigan Supreme Court, however, has ignored this broadly acknowledged requirement.[19] While *Robinson* borrowed its analysis directly from federal law, it failed to incorporate the special-justification requirement that permeates that body of law.[20] "The most significant aspect of this 'special justification' approach is that it requires more than a conviction that the challenged precedent was wrongly decided."[21] Requiring a special justification also promotes predictability in the Court's application of stare decisis by making it more difficult to apply the doctrine selectively.

In the instant case, the majority overrules longstanding caselaw interpreting a statute without any special justification. The majority simply concludes that the earlier caselaw was incorrectly decided, and, because the caselaw interpreted a criminal statute, no reliance interests are implicated. According to the majority, the habitual offender statutes clearly apply to multiple offenses committed on one occasion. As Justice CAVANAGH explains, this contradicts more than 150 years of precedent.[22]

The majority claims that it relies on the 1978 amendment of the habitual offender statutes. It refuses to

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here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 US at 172-173.

[18] *Id.*; *Arizona v Rumsey*, 467 US 203, 212; 104 S Ct 2305; 81 L Ed 2d 164 (1984); *People v Hickman*, 470 Mich 602, 617 n 6; 684 NW2d 267 (2004) (KELLY, J., dissenting); see also Note, *The unworkable unworkability test*, 80 NYU L R 1665, 1669-1670 (2005).

[19] See *Hickman*, 470 Mich at 617 n 6 (KELLY, J., dissenting).

[20] *Robinson*, 462 Mich at 463-464.

[21] Note, 80 NYU L R at 1670 (2005).

[22] *Ante* at 70 n 1, 78.

comment on "the correctness of any court's interpretations of the pre-1978 versions of the statutes."[23] Willful ignorance of prior caselaw does not make it disappear. Contrary to the majority's assertion, the post-1978 language of the habitual offender statutes does not clearly apply to multiple offenses committed on one occasion. Rather, the language of the habitual offender statutes is at least equally supportive of the conclusion that the statutes are inapplicable to multiple convictions arising from the same act. This is because they set out a "system of graduated enhancements for *subsequent* felonies . . . ."[24]

Accordingly, the 1978 amendments did not alter the command that "multiple convictions arising out of a single incident may count as only a single prior conviction under the statute . . . ."[25] Because the amended statutory language does not compel the result reached by the majority, it is appropriate to consider this Court's understanding of the preamendment statutory language. This long history should not be ignored simply because it does not suit the majority's analysis.

Nor is it illogical or inconsistent to stand by *Preuss* even though *Preuss* itself rejected, in part, *People v Stoudemire*.[26] *Preuss* held, contrary to some of the reasoning articulated in *Stoudemire*, that the habitual offender statutes did not require that a prior conviction be separated by intervening convictions or sentences.[27] However, *Preuss* specifically maintained *Stoudemire*'s holding that a defendant's prior offenses must arise

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[23] *Ante* at 65.

[24] *Ante* at 72.

[25] *Preuss*, 436 Mich at 720.

[26] *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987).

[27] *Preuss*, 436 Mich at 738-739.

from separate incidents.[28] Thus, *Preuss* and *Stoudemire* are controlling precedent on the point in issue.[29]

The majority asserts that binding courts to a strict-constructionist view of statutory interpretation ensures that courts are not arbitrary in their decision-making. The majority's decision in this case belies that claim. The statutory language at issue does not necessarily lead to the conclusion reached by the majority. Nonetheless, the majority is willing to change a longstanding rule of law that conflicts with its interpretation. Frequently, fair-minded people will disagree about what the language of a statute requires. Just because a majority of the justices on this Court proclaims a statute free from ambiguity does not make it so. This is precisely why it is so important that something more than a notion that an earlier case was incorrectly decided should be required before precedent is overruled.

Stare decisis is not an ironclad mandate. Because justices sometimes err, it is appropriate for us to reconsider earlier decisions.[30] When we do so, however, stare decisis requires that we give those decisions thoughtful and thorough consideration before tossing them aside. Our decision about whether an earlier case must be overruled should be guided by more than a notion that the case was incorrectly decided.[31]

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[28] *Id.* at 737.

[29] Whether *Preuss* correctly rejected *Stoudemire*'s reasoning concerning the timing of the convictions is not at issue here.

[30] See *Sington v Chrysler Corp*, 467 Mich 144, 184; 648 NW2d 624 (2002) (KELLY, J., dissenting).

[31] The majority relies on Justice MARKMAN's concurring statement in *Rowland* to counter my argument that it too freely overturns precedent with which it disagrees. Justice MARKMAN's primary assertion in *Rowland* was that our disagreement is less about our esteem for precedent than about the merits of the opinions being overruled. *Rowland,* 477 Mich at

In the matter before us, I would uphold *Preuss,* because it was correctly decided. Moreover, the doctrine of stare decisis dictates that it be upheld. *Preuss* remains workable, and no changes in the law or facts have undermined it. No special circumstances exist indicating that it should be overruled. Because *Preuss* interpreted statutory law, the Court should be especially hesitant to overrule it. If *Preuss* misinterpreted legislative intent, the Legislature can amend the habitual offender statutes to permit their application to multiple

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224. He then cited opinions in which I agreed with the precedent that the majority overruled. As I stated in *Rowland*, "[t]his amounts to little more than a circumstantial ad hominem logical fallacy." *Id*. at 257 n 12 (KELLY, J., dissenting).

Whether I will support precedents with which I disagree is a question not often brought to light but one I regularly confront. In recent years, I have frequently disagreed with the majority on the merits and resolution of issues presented to us. Once I have been outvoted and dissent, I face whether to reiterate my dissent in future cases raising the same issues. Often, I accede to the opinion of the majority. For instance, I recently joined the majority opinion in *State News v Michigan State Univ*, 481 Mich 692; 753 NW2d 20 (2008), even though it cited *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657; 753 NW2d 28 (2008), in which I dissented. Also, in the past 10 years, I have voted to deny leave in cases too numerous to list based on decisions reached by the majority, despite my disagreement with those decisions. This further indicates my frequent willingness to abide by and maintain precedents with which I disagree.

Contrary to Justice MARKMAN's belief, our respective records demonstrate that our disagreements stem frequently not solely from our view of the merits of issues but from our differing esteem for stare decisis. See *Rowland*, 477 Mich at 257 n 12 (KELLY, J., dissenting), citing Todd C. Berg, Esq., *Overruling Precedent and the MSC, The Justices' Scorecard*, Michigan Lawyers Weekly, November 6, 2006.

The majority's reference to Justice MARKMAN's accusations in *Rowland* concerning my record and views should be seen for what it is, a red herring, a distraction from the main point: the majority is choosing to overrule longstanding precedent in this case, as in so many before it, for wholly inadequate reasons.

offenses committed on one occasion.[32] *Preuss* is free from absurdity, not mischievous in practice, and is consistent with other adjudications of this Court.[33] For these reasons, as well as those articulated by Justice CAVANAGH, I dissent.

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[32] For the reasons stated by Justice CAVANAGH, I disagree with the majority's conclusion that the Legislature has amended the statutes to permit their application to multiple offenses committed on one occasion. *Ante* at 77-78.

[33] *Rowland*, 477 Mich at 255 n 8 (KELLY, J., concurring in part and dissenting in part).

In re COMPLAINT OF ROVAS AGAINST SBC MICHIGAN

Docket Nos. 134493 and 134500. Argued March 5, 2008 (Calendar No. 7). Decided July 23, 2008.

William and Sandra Rovas filed a complaint in the Public Service Commission (PSC) against Ameritech Michigan, now SBC Michigan, about a service fee that the company charged customers after determining that problems with their telephone service was due to the wiring on the customers' premises. The PSC determined that the company had made false statements to customers and entered an order that appeared to direct the company not to impose a service charge for diagnosing or responding to a problem caused by a customer's inside wiring without physically entering the customer's premises. The Court of Appeals, MURRAY, P.J., and DONOFRIO, J. (NEFF, J., concurring in the result only), affirmed with regard to the issue of false statements, but remanded the matter to the PSC for clarification of the apparent ambiguity in its order. *Ameritech Michigan v Michigan Pub Service Comm*, unpublished opinion of the Court of Appeals, issued June 17, 2004 (Docket No. 244742). On remand, the PSC revised its earlier order to provide that the company need not enter a customer's premises every time a service call is required, but it may not charge customers for the cost of services it provides to inspect, diagnose, and repair certain malfunctions, including routine physical checks of its own facilities, when reasonably necessary to diagnose problems attributable to its own network or exclude its facilities as a possible cause of disruptions to customer service. The company appealed, arguing that the PSC's order precluded the imposition of service charges related to nonregulated inside-wiring problems. The Court of Appeals, TALBOT, P.J., and CAVANAGH and METER, JJ., affirmed in part and remanded for entry of a modified order, holding that inside-wiring services are not within the scope of the PSC's common-carrier regulatory authority, so the PSC could not regulate correct determinations by a telephone company excluding its facilities as the cause of service disruption; however, the PSC may regulate a telephone company's activities regarding its own network or facilities and, accordingly, may restrict a telephone company from charging customers for services to diagnose problems attributable to the company's own facilities. *In re Complaint of*

Rovas Against Ameritech Michigan, 276 Mich App 55. Both SBC and the PSC sought leave to appeal, and the Supreme Court granted both applications. 480 Mich 977 (2007).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN, the Supreme Court *held*:

The Court of Appeals erred in upholding the PSC's interpretation of the statutory provision that prohibits a telecommunication service provider from making a false, misleading, or deceptive statement or representation regarding its service because the plain language of the provision does not support the PSC's interpretation that the provision penalizes all factually inaccurate statements; however, the Court of Appeals properly held that the PSC did not have authority over wiring inside a customer's home.

1. The proper standard of review for a court reviewing an agency's interpretation of a statute requires respectful consideration of the agency's interpretation and cogent reasons when overruling it. However, the court's primary consideration is whether the agency's interpretation is consistent with the plain language of the statute. While an agency's interpretation of a statute may assist in determining the Legislature's intent when the law is doubtful or obscure, that interpretation is not binding on the courts and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.

2. In concluding that SBC violated the statutory provision that prohibits a telecommunication service provider from making a false, misleading, or deceptive statement or representation regarding its service, the PSC did not analyze the language of the statute or provide a rationale for its conclusion that the term "false" meant "untrue" or "incorrect." Therefore, there is little for a reviewing court to respectfully consider when construing this provision.

3. Under the doctrine of *noscitur a sociis*, the fact that the word "false" appears in the context of the related statutory terms "misleading" and "deceptive" is the key to determining which of the multiple definitions of that term the Legislature intended. Accordingly, only statements or representations that are intentionally false, not mere mistaken communications, violate the statute.

4. The Court of Appeals properly ruled that, to the extent the PSC's order prohibits SBC from charging for services associated with a problem caused by inside wiring, it is improper. While SBC may have to inspect its outside wires to confirm that the problem is with the customer's inside wiring, the fact remains that if the

problem is with the inside wiring, then SBC must make a service call for an inside-wiring problem. Because the PSC cannot regulate that service, it must amend its order to eliminate that improper regulation.

Affirmed in part, reversed in part, and remanded to the PSC for further proceedings.

Justice KELLY, joined by Justices CAVANAGH and WEAVER, concurred in Part III of the majority opinion, which upholds the remand order of the second Court of Appeals panel, but dissented from the remainder of the opinion because it overturns the PSC's decision for no cogent reason on the basis of its misapprehension that the PSC construed the statutory provision at issue to impose strict liability for incorrect statements, and because it sends the message that reviewing courts need not afford agency decisions careful consideration. Because the second Court of Appeals panel properly deferred to the PSC after concluding that the PSC's legal conclusions were supported by substantial evidence on the record, the decision should be affirmed and the case should be remanded to the PSC for clarification of its order with respect to imposition of the service fee.

1. ADMINISTRATIVE LAW — AGENCIES — STATUTORY INTERPRETATION BY AGENCIES — STANDARD OF REVIEW.

The proper standard of review for a court reviewing an agency's interpretation of a statute requires respectful consideration of the agency's interpretation and cogent reasons when overruling it, with the court's primary consideration being whether the agency's interpretation is consistent with the plain language of the statute.

2. STATUTES — TELECOMMUNICATIONS ACT — WORDS AND PHRASES — FALSE STATEMENTS.

The statutory provision that prohibits a telecommunication service provider from making a false, misleading, or deceptive statement or representation regarding its service applies only to statements or representations that are intentionally false (MCL 484.2502[1][a]).

3. TELECOMMUNICATIONS — PUBLIC SERVICE COMMISSION — REGULATION OF TELECOMMUNICATIONS PROVIDERS — INSIDE WIRING.

The Public Service Commission may not regulate services that telecommunications companies provide on wiring inside their customers' premises.

Craig A. Anderson, *Lisa M. Bruno*, and *Dickinson Wright PLLC* (by *Peter H. Ellsworth*, *Jeffery V. Stuckey*, *Phillip J. DeRosier*, and *Trent B. Collier*) for SBC Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael A. Nickerson*, Assistant Attorney General, and *David A. Voges*, Assistant Attorney General Division Chief, for the Public Service Commission.

Amici Curiae:

Patrick J. Wright for the Mackinac Center for Public Policy.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Sherri A. Wellman* and *Michael C. Rampe*), for the Telecommunications Association of Michigan.

Stephen J. Gobbo and *Kimberly A. Breitmeyer* for the State Bar of Michigan Administrative Law Section.

YOUNG, J. This case concerns judicial review of an administrative agency's interpretation of a statute. This Court has not always been precise in articulating the proper standard for reviewing such interpretations. However, in accordance with longstanding Michigan precedent and basic separation of powers principles, we hold and reaffirm that an agency's interpretation of a statute is entitled to "respectful consideration," but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language. An agency's interpretation, to the extent it is persuasive, can aid in that endeavor.

In this case, the Court of Appeals did not properly review the agency's interpretation of the statute. Despite having understandable reservations about the agency's interpretation, the Court affirmed the agency's interpretation merely because it was "plausible."

However, the plain language of the statute does not support the agency's interpretation. Therefore, we reverse the Court of Appeals decision to uphold the agency's construction of the statute. Under the proper interpretation of the statute, SBC Michigan (SBC)[1] did not violate the statute as the Public Service Commission (PSC) had erroneously concluded. However, we agree with and affirm the conclusion of the Court of Appeals that the PSC had no jurisdiction over wiring inside a customer's home. Thus, we remand this case to the PSC with the instruction that it must modify its August 1, 2005, order to eliminate any PSC regulation of "inside wiring."

Accordingly, the Court of Appeals judgment is reversed in part and affirmed in part and the case is remanded to the PSC for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

This case began in April 2001, when William J. and Sandra M. Rovas, SBC customers, called to report an interruption in their service. SBC sent a technician, who checked the wiring outside their home and erroneously determined that the problem was inside the customers' home. Because the technician believed that the problem was inside the home, he left a note informing the customers that they would be charged $71 for the service call. Eventually, SBC realized the error and reversed the charge, but not before sending the customers a bill for the $71.

Despite the fact that SBC reversed the erroneously sent bill, the customers filed a complaint with the PSC

[1] We will use "SBC" to refer to SBC Michigan and its predecessor, Ameritech Michigan.

alleging, inter alia, a violation of § 2502(1)(a)[2] of the Michigan Telecommunications Act, MCL 484.2101 *et seq*.[3] The PSC agreed with the customers and found that SBC's statements to the customers that (1) the problem was inside their home and (2) they owed SBC $71 for the service call were both "false," and therefore, constituted violations of § 2502(1)(a). For erroneously sending a retracted $71 bill, the PSC fined SBC $15,000 for violating § 2502(1)(a).[4]

The Court of Appeals affirmed the PSC decision in an unpublished opinion per curiam, noting, however, that given the context of the term "false" in the statute, "it is plausible this provision is not intended to proscribe a statement that is simply not true or correct, but is only intended to proscribe those statements tending to deceive or mislead."[5] Nonetheless, the Court of Appeals affirmed the PSC because the panel believed it was

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[2] MCL 484.2502(1)(a). That section provides:

> (1) A provider of a telecommunication service shall not do any of the following:
>
> (a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive.

The statute was amended by 2005 PA 235, which added a second sentence to subsection (a). That sentence states, "As used in this subdivision, 'material information' includes, but is not limited to, all applicable fees, taxes, and charges that will be billed to the end-user, regardless of whether the fees, taxes, or charges are authorized by state or federal law." The amendment is not at issue here.

[3] The other aspects of the customers' complaint are not before the Court.

[4] The PSC imposed additional penalties for other violations; however, as noted, those violations are not at issue here.

[5] *Ameritech Michigan v Pub Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No.

"charged with giving great deference to the PSC's construction of a statute which the Legislature has required the PSC to enforce, and therefore the mere establishment of an alternative interpretation of a statute to that given by the PSC will not satisfy [SBC's] burden of proving the PSC's interpretation was unlawful or unreasonable."[6] However, the panel was concerned that a portion of the PSC order implementing its interpretation was "ambiguous" and remanded for clarification. Specifically, the panel and SBC were concerned that the order required SBC to enter each consumer's home to verify that the problem originated inside the house. This Court denied SBC's interlocutory application for leave to appeal.[7]

On remand, the PSC clarified its order by noting that "SBC need not enter a customer's premises *every* time that SBC is called upon to make a service trip";[8] however, SBC may not charge for services "if those services are reasonably necessary to diagnose problems attributable to its own facilities or exclude those facilities as a possible cause of service disruptions."[9]

In a published opinion, the Court of Appeals affirmed in part and remanded to require the PSC to issue a modified order.[10] In doing so, the panel relied on federal law and held that "inside wiring services" (services for problems with the wiring inside the customer's home) were not subject to regulation by the PSC because such

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244742), at 2. The instant case has been decided under several different names, but the parties have not changed.

[6] *Id*. at 3.

[7] *Ameritech Michigan v Pub Service Comm*, 472 Mich 890 (2005).

[8] Order of the PSC, August 1, 2005 (Case No. U-13079), p 4 (emphasis in original).

[9] *Id*.

[10] *In re Complaint of Rovas Against Ameritech Michigan*, 276 Mich App 55; 740 NW2d 523 (2007).

problems are not within the PSC's authority. Thus, the panel held that the PSC could not regulate "correct determination[s] by SBC excluding its facilities as the cause of service disruption" because a correct determination that the problem originated inside the customer's home necessarily involves "inside wiring."[11] Both the PSC and SBC have appealed to this Court, and this Court granted both applications.[12]

STANDARD OF REVIEW

As a general proposition, this Court reviews de novo questions of law, such as the proper interpretation of a statute.[13] However, the primary issue in this case is the proper standard of review of an administrative agency's construction of a statute. That standard of review is discussed below.

ANALYSIS

This case implicates the powers, and the boundaries of the powers, of all three branches: the Legislature, the judiciary, and administrative agencies, which are part of the executive branch.[14] Thus, separation of powers principles will aid in the analysis of the proper consideration due an administrative agency's interpretation of a statute.

The people of the state of Michigan have divided the powers of their government "into three branches: legislative, executive and judicial."[15] Furthermore, "[n]o

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[11] *Id*. at 60.

[12] *SBC Michigan v Pub Service Comm*, 480 Mich 977 (2007).

[13] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

[14] *Straus v Governor*, 459 Mich 526, 535; 592 NW2d 53 (1999).

[15] Const 1963, art 3, § 2.

person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."[16]

"The legislative power of the State of Michigan is vested in a senate and a house of representatives."[17] Simply put, legislative power is the power to make laws.[18] In accordance with the constitution's separation of powers, this Court "cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power."[19] While administrative agencies have what have been described as "quasi-legislative" powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.[20]

Since the time of *Marbury v Madison*,[21] interpreting the law has been one of the defining aspects of judicial power. "Although we may not usurp the lawmaking function of the legislature, the proper construction of a statute is a judicial function, and we are required to discover the legislative intent."[22] Administrative agen-

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[16] *Id*.

[17] Const 1963, art 4, § 1.

[18] "It is the legislators who establish the statutory law because the legislative power is exclusively theirs." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 65; 718 NW2d 784 (2006).

[19] *Id*. at 65-66.

[20] While rulemaking has legislative qualities, the power must be exercised pursuant to valid enabling legislation that does not improperly delegate "legislative" authority. *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 10 n 9; 658 NW2d 127 (2003).

[21] 5 US (1 Cranch) 137; 2 L Ed 60 (1803).

[22] *Webster v Rotary Electric Steel Co*, 321 Mich 526, 531; 33 NW2d 69 (1948) (citations omitted). See also *Kelly v Secretary of State*, 293 Mich 530, 533; 292 NW 479 (1940) ("[I]n the final analysis the construction of a statute still remains in the judicial branch of our government.").

cies exercise what have been described as "quasi-judicial" powers.[23] However, such power is limited and is not an exercise of constitutional "judicial power." The primary "judicial" function exercised by administrative agencies is confined to conducting contested cases, like the one at issue here. These administrative contested cases resemble trials. Constitutionally and statutorily, these administrative fact-finding exercises are entitled to a degree of deference defined by statute and our constitution.[24] However, fact-finding in an administrative contested case, much like in a trial before a circuit court, is a far different endeavor than construing a statute.

I. REVIEW OF AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF A STATUTE

With these separation of powers principles in mind, we now turn to the proper standard, under Michigan law, for reviewing an agency's construction of a statute.

A. MICHIGAN JURISPRUDENCE

Unlike the United States Constitution, the Michigan Constitution specifically recognizes administrative agencies. Furthermore, the constitution explicitly provides for judicial review of administrative decisions:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required,

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[23] Const 1963, art 6, § 28.

[24] *Id*. See also MCL 462.26(8).

> whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.
>
> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.[25]

The constitutional provision provides for review to determine: (1) that the decision is authorized by law, and (2) if a hearing is required, that the decision is supported by record evidence.[26] However, the provision does not stand for the proposition that agencies can assume this Court's constitutional role as the final arbiter of the meaning of a statute.

Before evaluating the standard of review applicable to an agency's interpretation of a statute, it is helpful to delineate the agency functions not at issue in this case. This distinction is important because there are different standards of review for different agency functions. As noted earlier, agencies perform both "quasi-legislative"

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[25] Const 1963, art 6, § 28.

[26] The constitutional convention that drafted our constitution explained the purpose of this provision in its "Address to the People":

> This is a new section recognizing the increased significance assumed by administrative law in the legal system of the state in recent years. It provides that decisions, findings, rulings and orders of administrative officers or agencies which affect private rights be subject to judicial review.
>
> Excepted in the section are findings of fact in workmen's compensation proceedings. These findings would be conclusive in the absence of fraud, unless otherwise provided by law. Also excepted are appeals of certain decision of agencies dealing with administration of property tax laws. [2 Official Record, Constitutional Convention 1961, p 3389.]

and "quasi-judicial" functions. First, there is the rule-making function. A reviewing court must determine whether the Legislature, in accordance with the separation of powers principles discussed, properly delegated authority to the agency to promulgate the rule at issue.[27] That question concerns the constitutionality of the statute, a legal issue that this Court reviews de novo.[28] If the Legislature has properly delegated the rulemaking authority, then the only question before the court is whether the agency "has exceeded its authority granted by the statute."[29]

The other agency function not at issue in this case is fact-finding in contested cases. The constitution requires that such agency findings be "supported by competent, material and substantial evidence on the whole record."[30] Review of an administrative agency's fact-finding is akin to an appellate court's review of a trial court's findings of fact in that an agency's findings of fact are entitled to deference by a reviewing court. In its fact-finding capacity, the agency has reviewed evidence, such as witness testimony, and it is in the best position to evaluate the credibility and weight of that evidence. Similar to the clear error standard of review for circuit courts, under the constitutional and statutory standards of review, a reviewing court must ensure that the finding is supported by record evidence; however, the reviewing court does not conduct a new evidentiary hearing and reach its own factual conclusions, nor does the reviewing court subject the evidence to review de novo.[31]

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[27] *Gate Pharmaceuticals*, *supra* at 10 n 9.

[28] *Id*. at 5.

[29] *Dep't of Natural Resources v Seaman*, 396 Mich 299, 314; 240 NW2d 206 (1976).

[30] Const 1963, art 6, § 28.

[31] *Viculin v Dep't of Civil Service*, 386 Mich 375, 392; 192 NW2d 449 (1971).

Keeping these other administrative functions distinct from review of an agency's interpretation of a statute during a contested case is very important to ensure that the appellate court applies the proper standard of review. A review of our own cases suggests that when courts are unmindful of these differing functions, they also tend to muddle the distinct standards of review that apply to each. This Court has uniformly held that statutory interpretation is a question of law that this Court reviews de novo.[32] Thus, concepts such as "abuse of discretion" or "clear error," which are similar to the standards of review applicable to other agency functions, simply do not apply to a court's review of an agency's construction of a statute.

Nonetheless, the Court of Appeals panel in this case did not apply a de novo standard of review when assessing the PSC's interpretation of MCL 484.2502(1)(a). While there are some opinions that seem to stand for the proposition that agency statutory interpretations are reviewed for "reasonableness" or an "abuse of discretion,"[33] those standards do not apply to the interpretation of a statute, and they threaten the separation of powers principles discussed earlier by allowing the agency to usurp the judiciary's constitutional authority to construe the law and infringe on the Legislature's lawmaking authority.

However, "[w]e acknowledge that our past case law has not been entirely consistent regarding the subject of

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[32] See, e.g., *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008); *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007); *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006); *City of Taylor*, *supra* at 115; and *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

[33] See *Champions Auto Ferry, Inc v Pub Service Comm*, 231 Mich App 699, 707-708; 588 NW2d 153 (1998); *In re MCI Telecom Complaint*, *supra* at 427.

the amount of deference to be given when an administrative agency with expertise in its field construes a statute governing the area regulated by the agency."[34] We believe that this is due in large part to the Court's failure consistently to use the same articulation of the proper standard of review for an agency's interpretation of a statute and to carefully apply the correct standards of review for different types of agency action.

This Court announced the proper standard of review for agency statutory construction more than 70 years ago in *Boyer-Campbell v Fry*,[35] which dealt with the proper construction of the General Sales Tax Act. The *Boyer-Campbell* Court held that

> the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.[36]

This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.

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[34] *In re MCI Telecom Complaint*, *supra* at 424 n 4.

[35] 271 Mich 282; 260 NW 165 (1935).

[36] *Id*. at 296-297 (citations and quotation marks omitted).

Boyer-Campbell remains good law, and it has been used repeatedly by this Court.[37] However, in some of our later cases, this Court and the Court of Appeals have employed recitations of standards that do not follow the language of *Boyer-Campbell* or apply to review of agency's statutory construction. While these recitations do not necessarily substantively conflict with *Boyer-Campbell*, they add to the confusion discussed earlier.[38] For example, in *Ludington Service Corp v Acting Comm'r of Ins*, this Court affirmed the Court of Appeals decision to overturn one portion of the agency's decision because the agency relied on an interpretation of a statute that conflicted with the statute's plain meaning.[39] First, the Court reversed a number of the agency's factual determinations because they were not supported by "competent, material, and substantial evidence."[40] The Court then turned to the statutory interpretation question

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[37] See *Howard Pore, Inc v State Comm'r of Revenue*, 322 Mich 49, 66; 33 NW2d 657 (1948); *Gen Motors Corp v Erves*, 395 Mich 604, 621; 236 NW2d 432 (1975) (COLEMAN, J.) ("It is the responsibility of the judiciary to interpret legislative intent and this responsibility cannot be delegated. We agree with the Court of Appeals that consideration should be afforded to the [agency] interpretation of this section. We cannot abdicate our ultimate responsibility."); *Id*. at 639-640 (WILLIAMS, J.).

[38] Justice KELLY cites this statement for the conclusion that this opinion does not accomplish anything other than assign a specific name to the standard of review. However, as discussed later in this opinion, some lower courts, such as the panel in this case, have relied on one of these varying standards to give nearly unfettered deference to an agency's interpretation of a statute. The definitions cited by Justice KELLY show how such an error could occur. For instance, the first definition of "deference" is "respectful *yielding* to the opinion . . . of another . . . ." *Post* at 121 n 9 (emphasis added). "Yielding" provides much more weight to an agency's interpretation than the "respectful consideration" to which such interpretations are entitled.

[39] 444 Mich 481, 497-498 and 498 n 23; 511 NW2d 661 (1994) (emphasis added).

[40] *Id*. at 493-494, 496-497, and 503.

and used the following standard of review in reaching that conclusion:

> Finally, while this Court affords deference to an agency's findings of fact, we can always review an agency's legal findings. Both the Michigan Constitution and the applicable statute permit this Court to set aside the commissioner's findings if they are in violation of the constitution or a statute, or affected by other substantial and material error of law.[41]

To that end, the Court held that "although this Court affords an agency some statutory deference, the agency's interpretation is not binding on this Court, and cannot be used to overcome the statute's plain meaning."[42] This standard does not directly conflict with *Boyer-Campbell* because the plain meaning of the statute still controlled the outcome; however, by referring to "deference" with regard to both the agency's fact-finding and its statutory interpretation, the Court sowed the seeds of confusion.

Another example of a confusing articulation of the standard is illustrated in *Adrian School Dist v Michigan Pub School Employee Retirement Sys*,[43] where this Court held that "[t]he agency must interpret the statute it administers, and its interpretations are entitled to great weight." The case cited for this proposition, *Magreta v Ambassador Steel Co*,[44] did not actually use the words "great weight," but, rather, quoted the general *Boyer-Campbell* standard discussed earlier. While the *Adrian School Dist* Court independently construed the statute, by employing a term such as "great

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[41] *Id*. at 503 (quotation marks omitted).

[42] *Id*. at 505 (quotation marks and emphasis omitted).

[43] 458 Mich 326, 336; 582 NW2d 767 (1998).

[44] 380 Mich 513, 519; 158 NW2d 473 (1968).

weight," this Court again allowed for the possibility that the judiciary must defer to the agency's interpretation of the statute.

A similar blurring of standards occurred in *Catalina Marketing Sales Corp v Dep't of Treasury*,[45] in which this Court held that, while it "affords deference to the construction of statutory provisions by any particular department of the government and used for a long period, the department's interpretation is not binding on this Court and cannot be used to overcome the statute's plain meaning . . . ." *Catalina* adds the concept of deference to longstanding agency interpretations to the general deference referenced in *Ludington*.[46] Like *Ludington*, *Catalina* recognizes the fundamental requirement that the statute's plain meaning controls.[47] Furthermore, the Court rejected the agency's interpretation because it conflicted with the plain meaning.

Because this Court's decisions that used imprecise language still made clear that the plain language of the statute was the controlling legal consideration, the varying deference standards articulated in them seem to have had negligible outcome determinative effect.

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[45] 470 Mich 13, 23-24; 678 NW2d 619 (2004) (quotation marks omitted).

[46] This case does not concern a longstanding interpretation of a statute. Thus, this aspect of *Catalina* is not before the Court. We note that the Court's reluctance to overrule longstanding agency interpretations may stem from the prudential concerns, such as reliance interests, discussed in *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000), with regard to the doctrine of *stare decisis*. However, we reserve decision on this issue until we are presented with a case that requires consideration of a longstanding agency interpretation in which reliance issues are at stake.

[47] See also *Czymbor's Timber, Inc v Saginaw*, 478 Mich 348, 356; 733 NW2d 1 (2007) ("[W]hile the DNR's interpretation of the statute is given some measure of deference, its construction cannot conflict with the plain language of the statute . . . .").

However, by employing words such as "deference," which can imply that the judiciary must accede to the agency's interpretation of a statute, this Court has unmistakably added to the confusion in this area of the law.[48]

Given this Court's difficulty in hewing to the correct standard it set forth in *Boyer-Campbell*, the Court of Appeals has understandably relied on some of the confusing articulations of standards made by this Court and thereby used the erroneous "deference" or "great weight" standard to allow agencies improperly to assume the courts' role as the final arbiter of a statute's meaning. For instance, the Court of Appeals panel in this case quoted *In re Michigan Cable Telecom Ass'n Complaint*[49] for the proposition that

> [a]s a general rule, we will *defer* to the construction placed on a statute by the governmental agency charged with interpreting it, unless the agency interpretation is *clearly erroneous*. An agency's initial interpretation of new legislation is not entitled to the same measure of *deference* as is a longstanding interpretation. However, merely establishing that another interpretation of a statute is plausible does not satisfy a party's burden of proving by *clear and convincing* evidence that the PSC's interpretation is *unlawful* or unreasonable.

This hybrid "standard of review" is a prime example of the mixing and matching of the standards of review applicable to the different functions of an agency. Relying on this muddled and unduly deferential "standard," the panel acceded to an agency interpretation that the

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[48] The order granting leave to appeal in *this* case is also an example of this confusion because we asked the parties to address "whether the commission *abused its discretion* in applying this statutory provision to a carrier's diagnostic mistakes." *SBC Michigan v Pub Service Comm*, 480 Mich 977 (emphasis added).

[49] 239 Mich App 686, 690; 609 NW2d 854 (2000) (emphasis added).

panel believed to be contrary to the plain meaning of the statute. When considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute. While a court must consider an agency's interpretation, the court's ultimate concern is a proper construction of the plain language of the statute.

By using a deferential standard inconsistent with *Boyer-Campbell*, the panel below abdicated its judicial authority to construe statutes. By acceding to the agency's interpretation, the panel gave greater consideration to the agency's interpretation than it would have given a circuit judge's construction. Given that statutory construction is the domain of the judiciary, it is hard to imagine why a different branch's interpretation would be entitled to more weight than a lower court's interpretation. As established in *Boyer-Campbell*, the agency's interpretation is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons. Furthermore, the agency's interpretation can be particularly helpful for "doubtful or obscure" provisions. But, in the end, the agency's interpretation cannot conflict with the plain meaning of the statute.

"Respectful consideration" is not equivalent to any normative understanding of "deference" as the latter term is commonly used in appellate decisions. To avoid further confusion, courts should rely on the *Boyer-Campbell* articulation of the standard of review for an agency's interpretation of a statute instead of more recent cases, which have erroneously introduced inappropriate concepts such as "deference." Furthermore, courts should carefully separate the different agency

functions under consideration and apply the proper standard of review for each.

B. A NOTE ON THE FEDERAL *CHEVRON*[50] DEFERENCE DOCTRINE

Some have urged that this Court adopt the *Chevron* deference doctrine, which federal courts use to review agency interpretations.[51] The *Chevron* test requires the court to make two inquiries. First, the court must consider "whether Congress has directly spoken to the precise question at issue."[52] This inquiry may be dispositive because "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[53] The separation of powers principles discussed above provide the basis for this inquiry and result because "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[54]

However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[55] The *Chevron* test for the permissibility of the agency's construction differs slightly depending on whether Congress explicitly or

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[50] *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

[51] However, there are other standards that may apply in certain circumstances. See *Skidmore v Swift & Co*, 323 US 134; 65 S Ct 161; 89 L Ed 124 (1944), and *Auer v Robbins*, 519 US 452, 461-463; 117 S Ct 905; 137 L Ed 2d 79 (1997).

[52] *Chevron*, *supra* at 842.

[53] *Id*. at 842-843.

[54] *Id*. at 843 n 9.

[55] *Id*. at 843.

implicitly delegated authority to the agency "to fill any gap" left by Congress. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[56] An explicit delegation largely refers to the authority bestowed by Congress upon agencies to promulgate rules to enforce a statute.[57] On the other hand, an implicit delegation arises when the legislation does not address a specific factual situation or where the statute is ambiguous.[58]

If Congress has given the agency an explicit delegation, then the "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[59] When the delegation is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation

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[56] *Id*. at 843-844.

[57] See *United States v Morton*, 467 US 822, 834; 104 S Ct 2769; 81 L Ed 2d 680 (1984) ("Congress authorized the promulgation of 'regulations for the implementation of the provisions of section 659,' 42 U.S.C. § 661(a)."); *Schweiker v Gray Panthers*, 453 US 34, 43; 101 S Ct 2633; 69 L Ed 2d 460 (1981) ("Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act."); and *Batterton v Francis*, 432 US 416, 425; 97 S Ct 2399; 53 L Ed 2d 448 (1977) ("Congress in § 407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of [Aid to Families with Dependent Children-Unemployed Fathers] eligibility.").

[58] See *Immigration & Naturalization Service v Jong Ha Wang*, 450 US 139, 144; 101 S Ct 1027; 67 L Ed 2d 123 (1981) ("The crucial question in this case is what constitutes 'extreme hardship.' These words are not self-explanatory, and reasonable men could easily differ as to their construction."), and *Train v Natural Resources Defense Council, Inc*, 421 US 60, 87; 95 S Ct 1470; 43 L Ed 2d 731 (1975) ("We therefore conclude that the Agency's interpretation of §§ 110(a)(3) and 110(f) was 'correct,' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one.").

[59] *Chevron*, *supra* at 844.

made by the administrator of an agency."[60] To that end, the Supreme Court has "recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."[61]

While the *Chevron* inquiries are comparatively simple to describe, they have proven very difficult to apply.[62] This Court has never adopted *Chevron* for review of state administrative agencies' statutory interpretations, and we decline to adopt it now.[63] The vagaries of *Chevron* jurisprudence do not provide a clear road map for courts in this state to apply when reviewing administrative decisions. Moreover, the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles discussed above by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government. For these reasons, we decline to import the federal regime into Michigan's jurisprudence.

II. PROPER INTERPRETATION OF MCL 484.2502(1)(a)

Having determined that agencies' constructions of statutes are entitled to respectful consideration, but are

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[60] *Id*.

[61] *Id*.

[62] Andersen, *Against Chevron — a modest proposal*, 56 Admin L R 957, 960 (2004) (footnotes omitted) ("The confusions extend to very basic questions, such as when the doctrine applies, how to distinguish its two steps from each other, and how to distinguish the test from other commonly used tests of agency action.").

[63] However, this Court has approvingly cited *Chevron* in the past. See, e.g., *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 416; 565 NW2d 844 (1997).

not binding on courts and cannot conflict with the plain language of the statute, we now turn to review § 2502(1)(a), which provides:

> (1) A provider of a telecommunication service shall not do any of the following:
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> (a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive.

The critical question here was the meaning of "false" and, thus, whether this statute penalized merely factually inaccurate statements, as the PSC concluded, or whether "false" includes a requirement that the inaccuracy be intentionally communicated. Importantly, the PSC did not actually provide an analysis for its "construction" of the statutory language. In its February 25, 2002, order, the PSC discussed the parties' arguments concerning this section. The hearing referee had found that the "inaccuracies" at issue stemmed from the difficulties inherent in diagnosing the problem experienced by the SBC customers. SBC argued that the "misdiagnosis" in this case was not the type of activity proscribed by the statute and the hearing referee agreed. The customers and the PSC staff contrarily argued that any *untrue* statement was subject to the statutory sanctions. The PSC agreed with the customers and the PSC staff, rejecting the hearing referee's application of the statute. In reaching that conclusion, the PSC first discussed three facts: (1) when the customers reported the problem, SBC's automated system informed them that they would only be charged for problems with inside wiring; (2) the technician, without entering the customers' house, informed the customers that the problem was inside and that the customers owed $71; and (3) the customers received an invoice for

$71 from SBC's automated billing process, even though SBC had determined that the problem was with the outside wiring. The PSC then concluded that, "[b]ased on these facts, the company's statements to [the customers] on April 3 and 4, 2001 were false," and therefore, SBC violated § 2502(1)(a). However, the PSC did not conclude that the false statements were intended to deceive.[64]

In reaching this conclusion, the PSC did not analyze the language of the statute, nor did it provide a rationale for its unexplained conclusion that the statutory term "false" meant "untrue" or "incorrect." The PSC's bald assertion that SBC violated the statute is not a "construction" of the statute. Therefore, under the *Boyer-Campbell* standard, there is little here for any reviewing court to "respectfully consider." The PSC, having failed to offer a construction of its own that would warrant any consideration, requires that we provide, as the panel below should have provided, an interpretation of the plain language of the statute.

The Court of Appeals acknowledged that "false" has multiple meanings, and the panel listed the following definitions:

> "1. not true or correct; erroneous; wrong: *a false statement*. 2. uttering or declaring what is untrue; lying: *a false witness*. 3. not faithful or loyal; treacherous; hypocritical: *a false friend*. 4. tending to deceive or mislead; deceptive: *a false impression* . . . ."[65]

The panel indicated that it favored the "tending to deceive or mislead" fourth definition because of the statutory context. Furthermore, the panel stated that it

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[64] Justice KELLY is correct that the PSC held that this was not a case of "simple misdiagnosis." However, the PSC did not rule, as Justice KELLY would, that "[t]hese statements were made with at least a reckless disregard of their truth or falsity." *Post* at 125.

[65] *SBC Michigan, supra* at 2, quoting *Random House Webster's College Dictionary* (1997), p 469.

found insufficient evidence in the record to support an intent by SBC to mislead its customers. However, relying on an erroneous standard of review, the panel upheld the decision of the PSC because the agency's interpretation "was quite literal and certainly not unlawful or unreasonable."

By ignoring the statutory context, the PSC's implicit interpretation of "false" was erroneous. "As a general matter, words and clauses will not be divorced from those which precede and those which follow. When construing a series of terms . . . we are guided by the principle that words grouped in a list should be given related meaning."[66] In other words, this Court applies the doctrine of *noscitur a sociis*, which "stands for the principle that a word or phrase is given meaning by its context of setting."[67]

The statute prohibits telecommunications providers from making "a statement or representation . . . that is false, misleading, or deceptive."[68] The context of the word "false" is the key to determining which of the multiple definitions of that term the Legislature intended, and the other related statutory terms—"misleading" and "deceptive"—provide that context. "Mislead" means "1. to lead or guide in the wrong direction. 2. to lead into error of conduct, thought, or judgment; lead astray,"[69] and "deceive" means "to mislead by a false appearance or statement; trick."[70] Thus,

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[66] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (internal citations and quotation marks omitted).

[67] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002) (citations and quotation marks omitted).

[68] MCL 484.2502(1)(a).

[69] *Random House Webster's College Dictionary* (1997). "Misleading" simply means "tending to mislead; deceptive." *Id*.

[70] *Id*. The statutory word "deceptive" means "likely to deceive; capable of deception." *Id*.

both "mislead" and "deceive" require the perpetrator intentionally to trick or lead astray his or her victim. These definitions provide insight into which "related meaning" of "false" the Legislature intended. The definition of "false" that has a related meaning to the other descriptive statutory terms is the fourth definition cited by the Court of Appeals: "tending to deceive or mislead; deceptive." Thus, a mere mistaken communication would be insufficient to make a "false" statement penalized under this statute. The fact that the SBC's technician's statement was simply "untrue" or that a bill mistakenly sent in reliance on the technician's incorrect diagnosis constitute insufficient proof to establish falsity required by the statute.[71]

Thus, we conclude that only statements that are *intentionally* false qualify as violations of the statute, and the Court of Appeals statutory construction determination and the PSC's conclusion that a statutory violation occurred must be reversed.

III. THE PROPRIETY OF THE COURT OF APPEALS REMAND ORDER

In its first opinion, the Court of Appeals held that the remedy provision of the PSC's February 25, 2002, order

[71] In its brief, the PSC suggests that § 2502(1)(a) is a strict liability provision. To support its position, the PSC points to MCL 484.2506(3), which provides for a "*bona fide* error" exception to MCL 484.2505 and 484.2507, and reasons that the lack of such an exception in § 2502(1)(a) means that the Legislature intended to punish mere mistakes under that section. MCL 484.2505(1) provides that "[a]n end user of a telecommunications provider shall not be switched to another provider without the authorization of the end user." MCL 484.2507(1) provides that "[a] telecommunications provider shall not include or add optional services in an end-user's telecommunications service package without the express oral or written authorization of the end-user." The problem with the PSC's analysis is that, as discussed above, the plain language of § 2502(1)(a) does not prohibit mere mistakes or "bona fide errors." Therefore, it would be unnecessary for the Legislature to provide such an exception to § 2502(1)(a).

was ambiguous and remanded for clarification. The Court was unsure whether the PSC required SBC to enter each customer's home to verify that the problem stemmed from wiring inside the customer's home. On remand, the PSC ruled:

> The Commission should clarify the discussion section of its February 25, 2002 order to indicate that SBC need not enter a customer's premises *every* time that SBC is called upon to make a service trip, but that it may not impose charges to recover the cost of services it provides to inspect, diagnose, and repair malfunctions covered by its tariff obligation, including the cost of conducting routine physical checks of its own facilities, in response to complaints or inquiries, if those services are reasonably necessary to diagnose problems attributable to its own facilities or exclude those facilities as a possible cause of service disruptions.[72]

In its second opinion, the Court of Appeals cited federal authority[73] for the proposition that states were generally precluded from regulating services provided by telephone companies for "inside wiring." However, states are free to regulate the telephone companies' networks or "outside wiring." On the basis of these principles, the panel took issue with the portion of the order directing "SBC not to impose charges for services that 'exclude [SBC's] facilities as a possible cause of service disruptions.' "[74] The Court held that this sentence violated the federal regulations because "a correct determination by SBC excluding its facilities as the

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[72] Order of the PSC, August 1, 2005 (Case No. U-13079), p 4 (emphasis in original).

[73] *In re Rovas Complaint*, *supra* at 59, citing Detariffing the Installation & Maintenance of Inside Wiring, 51 Fed Reg 8,498, 8,499 (March 12, 1986), & In re Detariffing the Installation and Maintenance of Inside Wiring, 7 FCC Rec 1,334, 1,339 (November 21, 1991).

[74] *In re Rovas Complaint*, *supra* at 60.

cause of service disruption inherently constitutes a correct determination that the disruption was caused by the customer's inside wiring."[75] The panel remanded to the PSC to remove any regulation of "inside wiring," including fees attributable to *correct* determinations that the problem originated with the customer's inside wiring.

The parties agree that SBC cannot charge for services performed for "outside wires" and that the PSC cannot regulate services on "inside wiring." The issue is whether the PSC's August 1, 2005, order is a permissible regulation of "outside wires" or an impermissible regulation of "inside wires." We agree with the Court of Appeals that, to the extent the order prohibits SBC from charging for services associated with a problem caused by inside wiring, it is improper. While SBC may have to inspect its outside wires to confirm that a problem is with the customer's inside wiring, the fact remains that if the problem is with the inside wiring, then SBC had to make a service call for an inside wiring problem. The PSC cannot regulate that service and must amend its order to eliminate that improper regulation.

CONCLUSION

With today's decision, we reaffirm the *Boyer-Campbell* standard of review, which provides a long-standing and clear standard for appellate courts to apply to an administrative agency's interpretation of a statute. In accordance with separation of powers principles and this Court's older cases, we hold that agency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict

[75] *Id.*

with the plain meaning of the statute. While the agency's interpretation may be helpful in ascertaining the legislative intent, courts may not abdicate to administrative agencies the constitutional responsibility to construe statutes. Giving uncritical deference to an administrative agency would be such an improper abdication of duty.

Applying the proper standard to the statute at issue in this case, the PSC's interpretation is erroneous, as was the panel's undue deference to that construction. The Court of Appeals alternative interpretation (which it did not adopt) represents the proper interpretation of this statute. Under the appropriate interpretation of the statute, merely incorrect statements made with no intent to deceive are not subject to sanctions. Additionally, the PSC must modify its order to incorporate a correct construction of the statute and eliminate any regulation of inside wiring.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

KELLY, J. (*concurring in part and dissenting in part*). I concur in Part III of the majority opinion, which upholds the propriety of the remand order of the second Court of Appeals panel. I dissent from the rest of the majority opinion because it is founded on a misunderstanding of the decision of the Public Service Commission (PSC).

The majority holds that, in Michigan, an agency's construction of a statute is entitled to "respectful consideration" and "should not be overruled without cogent reasons."[1] This standard of review, according to the majority, is different from giving agency interpreta-

[1] *Ante* at 108.

tions of statutes deference or great weight. I see no meaningful distinction between the various names the Court has given to the proper standard of review over the years. However, I see a noticeable lowering of the standard in the majority's actual application of it in this case.

The majority overturns the PSC's decision for no cogent reason. The agency's decision was not based on the erroneous statutory construction that the majority attributes to it. This case risks sending the unfortunate message that, from now on, reviewing courts need not afford agency decisions any careful consideration at all. I cannot join the majority in sending this message.

I would uphold the PSC's decision because it correctly applied MCL 484.2502(1)(a)[2] to prohibit statements made with reckless disregard of their truth or falsity or with knowledge of their falsity. It comports with the meaning of the statute. Consequently, it is entitled to great weight, deference, or the most respectful consideration, regardless of the name this Court gives to the proper standard of review of an agency's statutory interpretation.

The record supports the PSC's conclusion. Ameritech Michigan, the predecessor of SBC Michigan, charged a $71 service fee for an inside wiring problem without ascertaining that the customers' loss of service originated inside the home. It billed the fee even after

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[2] The Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq*., states at MCL 484.2502:

> (1) A provider of a telecommunication service shall not do any of the following:
>
> (a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive.

learning that the loss of service was due to a problem in its own network. The PSC correctly concluded that the service fee was predicated on false statements. The agency's conclusions, supported as they are by facts and law, should not be rejected.

I. THE STANDARD OF REVIEW OF STATUTORY INTERPRETATIONS BY ADMINISTRATIVE AGENCIES

The majority borrows its conclusion that an agency's interpretation of a statute is entitled to "respectful consideration" from this Court's decision in *Boyer-Campbell Co v Fry*.[3] It suggests that this standard of review cannot exist by any other name. It specifically rejects other decisions of the Court in which the standard of review was to "defer" to agency interpretations, to accord them "great weight," or to review their "reasonableness."[4]

Yet, the Court in *Boyer-Campbell* used these very terms interchangeably. It said:

> Legislative resolutions are not law, although they are entitled to *respectful consideration*, . . . and "the construction given to a statute by those charged with the duty of executing it is always entitled to *the most respectful consideration* and *ought not to be overruled without cogent reasons*." However, these are not binding on the courts, and "[w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given *weight* in construing such laws and is sometimes *deferred to when not in conflict with the indicated spirit and purpose of the legislature*."[5]

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[3] *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935).

[4] *Ante* at 103-107.

[5] *Boyer-Campbell*, 271 Mich at 296-297 (emphasis added; citations omitted).

The Court concluded in *Boyer-Campbell* that the interpretation of the general sales tax act made by the state board of administration was "reasonable and sensible."[6]

Boyer-Campbell does not stand for the proposition that the standard of review of agency decisions should be known by one name only. Nor does the fact that, over the years, the Court has used various terms to denote the proper standard of review indicate that it has been inconsistently applied. As the majority acknowledges, regardless of the language used, "this Court's decisions . . . made clear that the plain language of the statute was the controlling legal consideration."[7] The actual name given to the standard of review has "negligible outcome-determinative effect,"[8] as long as the standard is properly applied.

There is nothing shocking about the Court deferring to an agency's interpretation of a statute that the agency administers and that falls within its particularized expertise. "Deference" is simply another name for respectful consideration.[9] Under a properly applied standard of review, an agency's statutory interpretation

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[6] *Id*. at 300.

[7] *Ante* at 106.

[8] *Ante* at 106.

[9] *Random House Webster's College Dictionary* (2001) defines "deference" as "1. respectful yielding to the opinion . . . of another . . . . 2. respectful or courteous regard." The majority suggests that "yielding" to an agency interpretation of a statute has led to "nearly unfettered deference" by lower courts. *Ante* at 104 n 38. It is true that the first Court of Appeals panel in this case misunderstood the PSC's decision and deferred to it for the wrong reasons. However, when lower courts correctly construe an agency decision, as the second panel did, they should defer to the agency's interpretation of a statute that comports with the Legislature's intent. Were courts never to defer to agency interpretations, appeals from those interpretations would be encouraged in the hope that courts might be persuaded to ignore the interpretations entirely. That is precisely what happened in this case.

is entitled to deference when it comports with the Legislature's intent as expressed in the plain language of the statute. Of importance is not what the Court calls the standard of review, but how it applies it.

II. THE PSC'S CONSTRUCTION OF MCL 484.2502(1)(a)

The majority purports to review the PSC's construction of MCL 484.2502(1)(a) de novo. As it acknowledges, the PSC never specifically interpreted the meaning of the phrase "false, misleading, or deceptive" in its decision.[10] But it did apply the statute to the facts of the case, as it is entitled to do in the case of an unambiguous statute.[11] The meaning that the PSC accorded to the phrase "false, misleading, or deceptive" can be inferred indirectly from the legal conclusions it drew from the facts.

Although the majority recites the PSC's legal conclusions, it does not review them independently. Rather, it relies on the review of them made by the first Court of Appeals panel, and, in so doing, it repeats that panel's mistakes.[12] The majority reviews the decision of the first Court of Appeals panel de novo, but it does not directly review the decision of the PSC.

The first Court of Appeals panel concluded that the PSC understood "false" to mean "not true or correct" and, consequently, deemed a "false" statement to mean a simple mistake.[13] In essence, the panel assumed that

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[10] *Ante* at 113.

[11] "This Court has consistently held that when the statutory wording is unambiguous, it need only be applied." *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 497 n 22; 511 NW2d 661 (1994) (citations omitted).

[12] *Ante* at 113-114.

[13] *Ameritech Michigan v Pub Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 244742), p 2.

the PSC interpreted MCL 484.2502(1)(a) as imposing strict liability for any inaccurate statement, no matter how innocently made. The majority adopts this erroneous interpretation of the agency's decision.[14] It concludes that the PSC's statutory interpretation is erroneous because, in the phrase "false, misleading, or deceptive," which is its proper context, the word "false" does not mean "untrue." The majority concludes that it means "*intentionally* false" or "intended to deceive."[15] It derives its interpretation of "false" from the dictionary definitions of the words "misleading" and "deceptive."[16]

But the majority's conclusion that the statute refers to untrue statements made with an intent to deceive falls short of the mark. This occurs because it collapses two distinct elements of "deceit" into the phrase "intent to deceive": (1) knowledge or reckless disregard of the falsity of a statement and (2) intent that the statement cause detrimental reliance.

"Deceit," also known as "false or fraudulent misrepresentation," is a legal term of art with a long history in the common law. Legal terms of art are generally accorded their established meaning in the law.[17] In addition, statutes are construed so as not to abolish by implication "well-settled common-law principles."[18]

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[14] *Ante* at 113. On appeal, SBC argued for the same reading. Surprisingly, the Attorney General's office, which represented the PSC before this Court, contended that MCL 484.2502(1)(a) imposes strict liability, reaching even innocent mistakes. The strict liability argument that it advanced in this Court was not made before the PSC.

[15] *Ante* at 113, 115.

[16] *Ante* at 114-115.

[17] "A legal term of art is a technical word or phrase that has acquired a particular and appropriate meaning in the law. It is, in a statute, to be construed and understood according to such meaning." *People v Law*, 459 Mich 419, 425 n 8; 591 NW2d 20 (1999), citing MCL 8.3a.

[18] *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 652; 513 NW2d 799 (1994).

Black's Law Dictionary defines "fraudulent misrepresentation" as "[a] false statement that is known to be false or is made recklessly—without knowing or caring whether it is true or false—and that is intended to induce a party to detrimentally rely on it."[19] In Michigan, fraudulent representation requires

> "(1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury."[20]

As these definitions make clear, the intent element of deceit consists of (1) knowledge of falsity or reckless disregard of the truth or falsity of a statement, and (2) an intent that a person detrimentally rely on the statement.

The PSC's decision shows that the agency *did* apply the statute according to the established rules for false representation. The PSC applied the statute to the following facts: (1) the customers were told that the $71 service fee would be applied only if the problem was caused by inside wiring, (2) without so much as entering the home, the technician left a tag stating that the problem was with the inside wiring and the customers owed a $71 service fee, and (3) the customers subsequently received a $71 bill for the service call, even though, in the meantime, SBC had made several repairs to its own network that solved the customers' problem.

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[19] Black's Law Dictionary (7th ed).

[20] *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).

The PSC expressly stated that the $71 service fee did not result from a "simple misdiagnosis." Rather, it concluded that SBC's "propensity for assuming that the problem is with the inside wiring whenever a service technician finds a dial tone at the network interface, and for assessing the $71 charge without first verifying that the problem actually arises from within the customer's premises can lead to repeated violations of the MTA."

Because the PSC expressly declined to characterize the problem as a simple misdiagnosis, it is clear that it did not interpret the statute as imposing strict liability for simple mistakes. It deemed SBC's statements false because SBC initially imposed the $71 service fee without knowing that the problem the customers had complained of originated inside the customers' home. And it reimposed the fee after it ascertained that the problem was in its own network, not inside the home. These statements were made with at least a reckless disregard of their truth or falsity. They were made with an intent to cause the customers to pay the $71 service fee in reliance on SBC's representations that the problem originated inside the home. Thus, they were made with an intent to deceive.

Had the PSC expressly interpreted the statute, or had it stated its conclusions differently, it might have avoided the confusion its decision has engendered. However, it cannot be seriously faulted for not specifically stating that it applied the statute according to the rules of deceit. Those rules are well established and clearly deducible from the agency's legal conclusion.

The agency concluded that SBC assumes that a problem arises inside a customer's home without sufficiently testing its own network and without verifying that the problem is inside the home. The underlying premise of this conclusion is that SBC charges the service fee regardless of its lack of knowledge of the true

origin of the customer's loss of service. Such a charge is in reckless disregard of the truth or falsity of its assumption that the problem is inside the home.[21]

The Court misconstrues the agency's application of the statutory provision, and a misconstruction cannot constitute a "cogent reason" for overturning an agency's ruling.

III. THE RECORD EVIDENCE SUPPORTING THE PSC'S DECISION

In light of the fact that the PSC applied the statute correctly, the question becomes whether its factual findings are "supported by competent, material and substantial evidence on the whole record."[22] If supported by such evidence, they are entitled to deference, as the majority concedes.[23]

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[21] The majority acknowledges that the PSC held that this was not a case of "simple misdiagnosis," but it claims that the PSC never found that SBC charged the fee in reckless disregard of the truth or falsity of its assumption about the origin of the problem. *Ante* at 113 n 64. The majority fails to offer any other interpretation of the PSC's legal conclusions, which were based on SBC's inadequate diagnostic procedures rather than on the individual technician's misdiagnosis.

[22] Const 1963, art 6, § 28.

> What the drafters of the Constitution intended was a thorough judicial review of administrative decision, a review which considers the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. [*Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974).]

[23] *Ante* at 101.

The first Court of Appeals panel disagreed with the PSC's factual findings. It believed that the service fee was based on a simple diagnostic error.[24] The panel was unclear what evidence supported the PSC's conclusion that the charging of a service fee by SBC presented a systemic problem.[25] By contrast, the second Court of Appeals panel found substantial evidence supporting the PSC's conclusion.[26]

Indeed, substantial evidence on the whole record does support the conclusion that SBC based its charge of the service fee on an assumption. It assumed that, if its employee detected a dial tone at the network interface, the customer's problem was located inside the house. This assumption was in conscious disregard of the fact, well known by SBC, that there was a frequent problem of an intermittent signal transmitted by SBC's own facilities.

The complaining customer, William Rovas,[27] an engineer, presented the following evidence: He thoroughly checked his telephone line at the interface of his phone line and the SBC network line. He found that the line went dead after 8 to 15 minutes and diagnosed the problem as an intermittent dial tone. Rovas attempted to apprise SBC of his diagnosis during his initial service telephone call, but the SBC voice-mail system reduced his message to a cryptic "no dial tone."[28] Certain that the problem was in SBC's network, the technically

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[24] *Ameritech Michigan*, *supra* at 2.

[25] *Id*. at 3.

[26] *In re Complaint of Rovas Against Ameritech Michigan*, 276 Mich App 55, 63; 740 NW2d 523 (2007).

[27] The complainants were William and Sandra Rovas, but only William Rovas testified at the hearing before the hearing referee.

[28] On the basis of evidence of SBC's repeated miscommunications with the customer, the agency also concluded that SBC violated administrative rules concerning system maintenance and service quality, Mich Admin

sophisticated Rovas unplugged the telephone equipment inside his home to give the SBC technician a clear outside line.

The SBC technician who made the first service visit left a tag on the door of the Rovases' home. On the tag, he had marked a box that corresponded to the following preprinted text: "The outside lines were checked. The problem shows to the inside premises. A charge of $71 applies to today's visit."

Rovas was understandably baffled. First, his own testing had shown that the SBC network was sending an intermittent signal. Second, the tag did not indicate how the technician could have concluded that the problem was inside without entering the premises. Third, the tag did not identify what problem inside the premises the technician had actually diagnosed and whether that problem was the same one of which Rovas had complained.[29]

Rovas additionally complained that, although SBC eventually correctly diagnosed the problem as an intermittent dial tone and fixed its own network, the service fee still appeared on the monthly telephone bill. Rovas's evidence established that SBC charged the fee without ascertaining that the problem was inside the home, then billed Rovas for it, knowing that the problem was outside the home.

Code R 484.31 and R 484.51(1)(c), which have since been rescinded. This part of the PSC's decision is not on appeal.

[29] The service tag message is misleading. It does not make clear whether checking the outside lines includes checking the inside phone wires at the network interface. Rather, it assumes that the problem is inside after a check of the outside lines found them working properly, although only momentarily. The fact that an outside line functions momentarily is not a reliable basis for charging the customer the nonregulated $71 service fee if an intermittent dial tone is a possible problem. The fee should be reserved for problems known to originate inside the home.

SBC offered several witnesses. Notably not among them was the technician who had left the tag and charged the service fee. The PSC staff placed a continuing objection to the speculative testimony of Tom Dunning, the dispatch control manager. He testified that the technician must have followed SBC's procedures. He must have used an intelligent field device (IFD), Dunning stated, capable of checking both the inside and outside wiring at the network interface outside the Rovases' home. Dunning testified:

> If the technician went and tested at the network interface, found the . . . network was providing dial tone to the network interface, he would assume that the trouble, because he did have good dial tone, could have been in the customer's home.
>
> He would look in with his IFD. He would test it both ways. If there was a shorted out [sic], he would have obviously known that, but by looking inside, and he did not see any equipment on the inside, so he would bill the customer.

Dunning also testified that an intermittent dial tone was something the technicians dealt with on a daily basis. However, he did not identify any procedures that SBC followed to distinguish this common problem from a problem inside a home. Rather, according to his testimony, technicians were reprimanded only if they took no corrective action when they found no dial tone at the network interface.

The hearing referee and the first Court of Appeals panel agreed with SBC that the problem of an intermittent dial tone is difficult to diagnose or fix. They reasoned that the technician incorrectly diagnosed the problem because the telephone equipment inside the home had been unplugged. This view of the evidence is both incorrect and one-sided.

First, the hearing referee and the Court of Appeals gave the SBC technician the benefit of the doubt, assuming that he tested the inside wires even though the service tag did not indicate it. Nor did the tag identify the problem that the technician diagnosed inside the home. I find it inappropriate to give SBC the benefit of the doubt under the circumstances. Because SBC asserted that the technician made an innocent mistake, it had the burden to prove that assertion. It also controlled its own witnesses. Yet, the technician was not called to testify about the basis for his diagnosis. Instead, SBC relied on Dunning's speculation that the disconnected equipment inside the home led to the service-fee charge.

Additionally, Dunning did not explain what justified the technician's assumption that the problem of which the customer had complained stemmed from the disconnected equipment inside the home. The lack of equipment inside may signal a number of things, including, in this case, that the customer intentionally disconnected his phone. Unlike a shorted wire, disconnected equipment does not necessarily qualify as a "problem" with inside wiring. The assumption that disconnected equipment is a malfunction inside the home may lead to repeated charges of a service fee although the malfunction is in the outside network. Such charges are all the more inappropriate when, as in this case, the customer has attempted to help SBC isolate the problem.

Lastly, both the hearing referee and the first Court of Appeals panel assumed that it was difficult to diagnose the Rovases' problem as an intermittent dial tone. SBC's witnesses testified that it was difficult to diagnose what causes an intermittent dial tone. Dunning explained that it may be caused by a weatherworn conductor somewhere on the outside line. Indeed, SBC

never identified the precise cause of the problem in this case and ultimately connected the Rovases to a new telephone line.

But the fact that the cause of an intermittent dial tone is difficult to identify does not mean that it is difficult to identify the problem as an intermittent signal from SBC's network. In fact, when Rovas first called SBC, he had already concluded that the SBC network was sending an intermittent signal to his home. He attempted to relate his conclusion to SBC. Rovas's frustration with SBC was in large part due to the company's apparent incompetence in light of his correct original diagnosis.

No witness testified that SBC's technicians were trained to check whether a customer's problem was due to an intermittent signal in SBC's network. On the contrary, SBC's procedures allowed technicians to assume that an outside line was functional as long as it sent a signal at the moment of testing. SBC's procedures were clearly inadequate, considering that an intermittent dial tone is an everyday concern that requires more than a momentary testing of the outside line.

On the entire record before it, the agency was justified in its conclusion that SBC failed to establish that this was a case of a simple misdiagnosis. SBC's own procedures made it clear that its technicians were permitted to assume without further testing that an outside line was functional if it sent a signal when tested once. The technicians did not attempt to determine whether the customer's telephone equipment had been disconnected. The technicians charged a service fee after insufficient testing. The tag did not identify the problem that justified the fee, nor did it match the technician's diagnosis with the problem of which the consumer complained.

If an intermittent dial tone occurs daily and SBC does not require its technicians to adequately test for it before charging a service fee, SBC recklessly ignores a known problem. Additionally, SBC neglects to take the improper service fee off the customer's telephone bill even after it knows that the complained-of problem is in its own network. The fee is refunded only if the customer complains.

As the PSC concluded, these company practices can lead to repeated violations of the MTA. SBC charges a service fee on the pretext that a complained-of problem is inside the customer's home. In that way, it imposes part of the cost of repair on the customer in cases of an intermittent dial tone caused by problems in the outside lines. SBC does so in violation of its duty to repair its own network without direct charge to its customers.

The PSC's decision is supported by competent, material, and substantial evidence on the whole record. Despite the first panel's faulty reasoning, both it and the second Court of Appeals panel correctly affirmed the decision.

IV. THE PSC'S ORDER

The PSC has now twice attempted to limit the circumstances under which SBC can charge its $71 service fee. The agency amended its original order to clarify that a technician is not always required to enter a customer's home in order to verify that the complained-of problem originates inside. The amended order prohibits, among other things, the imposition of a fee for services needed to "exclude SBC's facilities as a possible cause of service disruptions." The second Court of Appeals panel took issue with this language and

remanded the order to the PSC for additional modification to avoid the impression that the PSC impermissibly regulates inside wiring.[30]

I concur with the majority in affirming this part of the second Court of Appeals decision. I believe that the PSC's order needs to more accurately address the problem of SBC's knowing or reckless failure to test for an intermittent dial tone at the network interface.[31]

V. CONCLUSION

The majority holds that a Michigan agency's interpretation of a statute that is within its area of expertise is not binding on the courts. Also, an agency interpretation cannot conflict with the plain meaning of the statute. There is nothing new or controversial about these holdings.

The majority also holds that an agency's interpretation of a statute entrusted to it is not entitled to "great weight" or "deference." It is instead entitled to "respectful consideration." It is not clear what is distinct about this interpretative rule, and the majority neglects to explain the distinction. It neglects also to explain how to apply its "new" rule.

Noteworthy is the fact that the majority also neglects to include in its rule certain crucial language from *Boyer-Campbell,* the opinion on which it relies. In

[30] *In re Rovas Complaint*, 276 Mich App at 66.

[31] SBC argued before the agency that the service fee should be prohibited only if SBC determines that its network was the source of the malfunction. However, SBC cannot accurately determine the source until it changes its diagnostic procedures. SBC argued that it had improved its diagnostic technology and extensively trained its technicians. The PSC should consider whether these improvements ensure that SBC can correctly diagnose problems in its own network and does not charge customers for them prematurely.

reciting the correct rule, *Boyd* mentions giving "most respectful consideration." But it does not stop there: it goes on to say that the construction accorded to a statute by an administrative agency charged with the duty of executing it "ought not to be overruled without cogent reasons."[32] *Boyer-Campbell* then cites with approval another Michigan Supreme Court decision, *Owosso Bd of Ed v Goodrich*.[33] *Owosso* states that courts are to give *weight* to the practical construction accorded to statutes by agencies and that agencies' interpretations should sometimes be *deferred to*.[34]

Hence, it is not clear what, if any, meaningful change the majority makes in the standard of review applicable to agencies' interpretations of statutes that they enforce. What is important here is the majority's erroneous application of the standard of review.

I dissent from the majority's opinion because it overturns the PSC's decision on the ground that the PSC incorrectly construed the phrase "false, misleading, or deceptive" to impose strict liability for incorrect statements. The PSC did not impose strict liability. Rather, on the evidence before it, it correctly concluded that SBC assessed a service fee before it knew that the customers' problem was inside the home. It then billed the customers with knowledge that the problem was in the outside line. SBC's procedures indicated that the failure to test for an intermittent dial tone at the network interface was a systemic problem rather than a one-time mishap.

I conclude that the first Court of Appeals panel reached the correct result even though the panel mis-

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[32] *Boyer-Campbell*, 271 Mich at 296 (quotation and citation omitted).

[33] *Owosso Bd of Ed v Goodrich,* 208 Mich 646, 652; 175 NW 1009 (1920).

[34] *Id*. (emphasis added).

interpreted the agency's decision and deferred to the agency for the wrong reasons. I would affirm the decision of the second Court of Appeals panel in its entirety. The panel correctly deferred to the PSC after concluding that the agency's decision was supported by substantial evidence on the record. I would uphold the PSC's decision and would remand the case to the agency for clarification of its order. The limitations it imposed on SBC's ability to charge the $71 service fee concern only SBC's premature imposition of the fee based on insufficient testing for a commonly occurring problem.

CAVANAGH and WEAVER, JJ., concurred with KELLY, J.

WHITE v TAYLOR DISTRIBUTING COMPANY, INC

Docket No. 134751. Argued March 4, 2008 (Calendar No. 6). Decided July 23, 2008.

Sherita and Derrick White brought a negligence action in the Oakland Circuit Court against James Birkenheuer, Taylor Distributing Company, Inc., and Penske Truck Leasing Company, L.P., after a tractor-trailer Birkenheuer was driving struck a van Sherita White was driving when Birkenheuer allegedly passed out following a severe gastrointestinal disturbance. The court, Deborah G. Tyner, J., granted the defendants' motion for summary disposition on the basis of the sudden-emergency doctrine, and the plaintiffs appealed. The Court of Appeals, MARKEY, P.J., and MURPHY, J. (KELLY, J., dissenting), held that the trial court erred in granting summary disposition, despite the fact that the plaintiffs failed to submit sufficient documentary evidence in response to the motion, because the determination whether Birkenheuer was negligent or experienced a sudden emergency necessarily depended on Birkenheuer's own account of the events preceding the accident, which could not have been rebutted by any documentary evidence and which required the finder of fact to assess Birkenheuer's credibility. 275 Mich App 615 (2007). The defendant applied for leave to appeal, which the Supreme Court granted. 480 Mich 961 (2007).

In a unanimous memorandum opinion, the Supreme Court *held*:

The Court of Appeals properly reversed the trial court's order granting summary disposition because there was a genuine issue of material fact regarding whether the sudden-emergency doctrine applied given the conflicting evidence about whether Birkenheuer knew or should have known that he was feeling too ill to continue driving.

Affirmed and remanded to the trial court for further proceedings.

Mark Granzotto, P.C. (by *Mark Granzotto*) and *Gursten, Koltonow, Gursten, Christensen & Raitt, P.C.* (by *Steven M. Gursten*), for the plaintiffs.

John P. Jacobs, P.C. (by *John P. Jacobs*, *Timothy A. Diemer*, and *Andrew T. Strahan*) and *Kopka, Pinkus,*

Dolin & Eads, PLC (by *John T. Eads III*), for the defendants.

Amicus Curiae:

Vandeveer Garzia, P.C. (by *Hal O. Carroll*), for the Michigan Defense Trial Counsel, Inc.

MEMORANDUM OPINION. At issue is whether the trial court properly granted summary disposition to defendant on the basis of his claim that he experienced a sudden emergency. Defendant,[1] James Birkenheuer, rear-ended plaintiff, Sherita White, while she was stopped for a red light. By statute, the driver of a vehicle that strikes another from behind is presumed negligent.[2] But defendant claims that, as a matter of law, the statutory presumption should not apply to him because he experienced a sudden emergency when he blacked out seconds before the collision. We disagree. We conclude that there are genuine issues of material fact regarding defendant's claim of a sudden emergency. Accordingly, we affirm the Court of Appeals reversal of the trial court's grant of summary disposition to defendant.

On March 15, 2004, defendant was driving from Cincinnati, Ohio, to Novi, Michigan. He stated that he

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[1] Defendant Taylor Distributing Company is defendant James Birkenheuer's employer. Defendant Penske Truck Leasing Company, L.P., was the owner of the tractor-trailer defendant was driving. Because the liability of these two defendants arises from Birkenheuer's conduct, the term "defendant" will be used to refer to Birkenheuer.

[2] MCL 257.402(a) states:

> In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

stopped at a rest area in Canton, Michigan, because he experienced an urgent onset of severe diarrhea. After the diarrhea episode, defendant stated that he waited about 20 minutes at the rest area to see how he felt. Not experiencing further illness, he continued his trip.

Defendant stated that as he took the Novi Road exit ramp some 30 minutes later, he began to feel dizzy and broke into a sweat. He recalled seeing plaintiff's car about 250 to 300 yards in front of him, stopped at a red light at the end of the ramp. Defendant applied his brakes, began gearing down, and then blacked out. He has no recollection of events that occurred before the impact with plaintiff's vehicle jarred him to consciousness. After the collision, he applied his emergency brake, set his emergency flashers, and got out of his truck, but blacked out again in the road. He was assisted by other motorists and then treated by emergency medical personnel at the scene.

Defendant was taken to a hospital by ambulance. He was diagnosed as having experienced a "syncopal episode," meaning that he blacked out. While at the hospital, he described the accident to a police officer and was ticketed for violating MCL 257.627(1)—failure to maintain an assured clear distance ahead. The next day, defendant visited his family doctor, who diagnosed defendant as having experienced "viral enteritis with syncopal spell secondary to hypovolemia" (intestinal inflammation with secondary blackout).

Plaintiff filed a suit alleging that defendant was presumed negligent under MCL 257.402(a) because he had struck plaintiff's vehicle from the rear.[3] Defendant moved for summary disposition under MCR 2.116(C)(10), asserting that he was not negligent under

[3] Plaintiff also alleged a violation of MCL 257.627(1), which requires a motorist to maintain an "assured, clear distance ahead." Because the

the circumstances because his illness created a sudden emergency. Defendant submitted his deposition testimony, the accident report, and related medical reports in support of his motion. Plaintiff argued that questions of fact existed regarding whether defendant had actually blacked out before the accident and whether defendant knew or should have known that he was not in a condition to drive when he left the rest area after experiencing severe diarrhea. The trial court granted defendant's motion. Plaintiff appealed.

The Court of Appeals reversed the trial court, holding that summary disposition was not appropriate because the key evidence was within defendant's exclusive knowledge. *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 630; 739 NW2d 132 (2007). We granted defendant's application for leave to appeal. 480 Mich 961 (2007).

"We review de novo decisions on summary disposition motions." *AFSCME v Detroit,* 468 Mich 388, 398; 662 NW2d 695 (2003) (quotation omitted). A court reviewing a motion under MCR 2.116(C)(10) "must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The statutory presumption of negligence under MCL 257.402(a) may be rebutted by showing the existence of a sudden emergency. *Vander Laan v Miedema,* 385 Mich 226, 231; 188 NW2d 564 (1971). The sudden-emergency doctrine applies "when a collision is shown to have occurred as the result of a sudden emergency not of the

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analysis of § 627(1) is virtually identical, we examine plaintiff's claim under § 402(a) only. *Zeni v Anderson*, 397 Mich 117, 134; 243 NW2d 270 (1976).

defendants' own making." *Id.*, citing *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964).

Defendant asserts that he experienced a sudden emergency when he became dizzy and blacked out on the exit ramp seconds before he collided with plaintiff's vehicle; thus, the statutory presumption should not apply. We agree that a sudden, unexpected blackout could present a sudden emergency sufficient to rebut the statutory presumption.[4] But a sudden emergency sufficient to remove the statutory presumption must be "totally unexpected." *Vander Laan*, *supra* at 232. There is evidence that defendant may have known or should have known that he was not feeling well when he continued driving after his urgent stop at the Canton rest area. This creates a genuine issue of material fact regarding whether defendant's emergency was totally unexpected.[5]

Defendant testified that after experiencing a severe episode of diarrhea at the rest area, "I hung around a

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[4] In *Soule v Grimshaw*, 266 Mich 117, 119; 253 NW 237 (1934), we recognized that a sudden loss of consciousness while driving could present a sudden emergency sufficient to rebut the presumption of negligence.

[5] We note that there is also a question of fact regarding whether defendant blacked out while driving or whether he only blacked out after the accident. Defendant was driving alone and no one witnessed his condition immediately before the collision. The evidence reveals inconsistencies between defendant's condition immediately following his alleged precollision blackout and his condition immediately following the undisputed blackout after the collision. For instance, defendant experienced incontinence following the undisputed blackout (after the collision), but not following the disputed blackout (before the collision). Further, although defendant experienced a lowered level of consciousness following the postaccident blackout, there is evidence that he did not experience a lowered level of consciousness following the alleged preaccident blackout; specifically, his testimony that when he was jarred awake from the latter he immediately activated his emergency flashers, applied his emergency brake, and got out of his cab to check on plaintiff's condition.

while, walked around to make sure I was finished and felt fine so I continued on to where I had to go *because it wasn't far away*." This emphasized statement could imply that defendant was aware he was not feeling well, but chose to continue driving his tractor-trailer because he felt he could make the short trip despite his condition.

Defendant states that he "felt great" while driving some 30 minutes between the Canton rest area and the Novi Road exit. But this statement is called into question by the medical records and deposition testimony submitted to the trial court. The emergency room (ER) physician who treated defendant stated that "[a] couple of episodes of diarrhea would not typically cause a syncopal episode. Pain, abdominal cramping or severe cramping or any kind of pain can cause someone to have a syncopal episode, but a couple of episodes of diarrhea would not cause him to pass out."

Defendant's family physician diagnosed defendant with viral enteritis severe enough to cause a blackout. Viral enteritis is an inflammation of the intestines with symptoms including nausea, vomiting, diarrhea, cramps, and abdominal pain. So, the independent opinions of the two doctors treating defendant within 24 hours of the accident agree that defendant's condition would have caused ongoing symptoms such as cramps and pain. Further, the officer who responded to the accident noted that defendant "states he 'blacked out,' possibly from being ill." It is unclear from this statement whether defendant was referring to his diarrhea at the rest area or to illness at some time more immediately before the accident. If defendant experienced ongoing symptoms or felt ill after his first onset of urgent illness at the rest stop, then any subsequent emergency was not totally unexpected and, thus, not sudden.

The ER physician also testified regarding how quickly defendant's syncopal episode may have developed: "In my opinion, I would say that happened over, you know, several seconds, a couple of minutes, that's pretty sudden." If defendant felt dizzy "a couple of minutes" before blacking out, then perhaps his subsequent emergency was not clearly sudden under the circumstances. Further, for the sudden emergency doctrine to apply, the emergency must not be of defendant's own making. *Vander Laan*, *supra* at 231. If defendant was aware that he was not feeling well when he left the rest area but continued driving anyway because he "did not have far to go," or if defendant felt ill while driving from the rest area to the Novi Road exit, or if defendant felt ill even a few minutes before he collided with plaintiff, then the emergency may well have been of his own making.

Additionally, defendant's statements regarding the cause of his condition are inconsistent. The notes from defendant's visit to his family doctor the day after the accident state that defendant "blacked out while driving . . . feels like it was from eating a hardboiled egg 1 hour prior." This information was not given to the ER physician. When asked at deposition about what he had to eat or drink before the accident, defendant did not mention the hardboiled egg. We think that information about the cause of defendant's condition could have better established how defendant was feeling before the accident. Defendant's inconsistent statements about the cause of his illness create issues of material fact precluding summary disposition.

We do not assess defendant's credibility. But, under the legal and factual circumstances, "[w]e do not ignore the inconsistencies in defendant's statements . . . ." *Bridwell v Segel*, 362 Mich 102, 106; 106 NW2d

386 (1960). The questions regarding whether defendant experienced a sudden emergency and whether defendant was negligent in driving under the facts presented in this case are proper questions for the jury. *Soule v Grimshaw*, 266 Mich 117, 120; 253 NW 237 (1934).

We affirm the Court of Appeals decision to reverse and remand this case to the trial court for further proceedings. Under the facts of this case, the trial court improperly granted summary disposition to defendant.

TAYLOR, C.J., and CAVANAGH, WEAVER, KELLY, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

STONE v WILLIAMSON

Docket No. 133986. Argued January 8, 2008 (Calendar No. 4). Decided July 24, 2008.

Carl and Nancy Stone brought a medical-malpractice action in the Jackson Circuit Court against David A. Williamson, M.D., Jackson Radiology Consultants, P.C., and W. A. Foote Memorial Hospital, alleging that a negligent diagnosis had led to the rupture of an aneurysm and resulting trauma for Carl Stone, including the amputation of both of his legs. At trial, the plaintiffs presented expert testimony that, had the aneurysm been diagnosed properly, Stone could have had elective surgery that would have greatly increased his chance of a better medical outcome. The defendants argued that the risk of death should be factored out when calculating the probability of a better outcome, because Stone survived. The jury returned a verdict in the plaintiffs' favor. The court, Chad C. Schmucker, J., denied the defendants' motions for a new trial and judgment notwithstanding the verdict. The Court of Appeals, SERVITTO, P.J., and TALBOT and SCHUETTE, JJ., affirmed in an unpublished opinion per curiam, issued April 17, 2007 (Docket No. 265048). Considering all the increased risks that Stone faced and applying the formula of *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), the Court concluded that the plaintiffs had satisfied MCL 600.2912a(2), which states that a medical-malpractice plaintiff cannot recover damages for "loss of an opportunity . . . to achieve a better result unless the opportunity was greater than 50 percent." The defendants sought leave to appeal, which the Supreme Court granted, including in the issues to be addressed on appeal whether *Fulton* was decided incorrectly. 480 Mich 895 (2007).

In an opinion by Chief Justice TAYLOR, joined by Justices CORRIGAN and YOUNG, and an opinion by Justice CAVANAGH, joined by Justices WEAVER and KELLY, the Supreme Court *held*:

This case does not involve a claim under MCL 600.2912a(2) for the loss of an opportunity. The plaintiffs' proofs satisfied the elements of a traditional medical-malpractice claim, and the result of the Court of Appeals judgment is affirmed.

Result affirmed.

Chief Justice TAYLOR, joined by Justices CORRIGAN and YOUNG, would further hold that the second sentence of MCL 600.2912a(2), which addresses loss of opportunity, is substantially incomprehensible and is unenforceable because it provides no guidance regarding its meaning or how courts are to apply it. Moreover, the second sentence impossibly conflicts with the first sentence of MCL 600.2912a(2), which codified the common law. Under the first sentence, a medical-malpractice plaintiff must prove that he or she suffered an injury that the defendant's negligence more probably than not caused. Even though the lower courts erred by applying *Fulton* and the trial court incorrectly instructed the jury, retrial is not necessary because it is clear that the jury found that the plaintiffs had satisfied the traditional causation and injury elements of medical malpractice. Chief Justice TAYLOR, however, would reject the analysis of the Court of Appeals.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, disagreed with Chief Justice TAYLOR's analysis of the second sentence of MCL 600.2912a(2) and conclusion that it is incomprehensible and unenforceable, and would further hold that the circumstances of the amendment of the statute clarify the meaning of the statutory language. The Legislature added MCL 600.2912a(2) in response to *Falcon v Mem Hosp*, 436 Mich 443 (1990), which allowed an action for the loss of an opportunity to survive. Interpreted in that light, the first sentence of MCL 600.2912a(2) codified a medical-malpractice plaintiff's burden of proving that he or she suffered an injury that the defendant's negligence more probably than not caused, even if the alleged injury is the loss of an opportunity to avoid harm that *Falcon* recognized. The second sentence of the statute merely sets the threshold for invoking the loss-of-opportunity doctrine by requiring that the plaintiff's premalpractice opportunity to survive or achieve a better result be greater than 50 percent. Thus, the two sentences do not conflict.

Justice MARKMAN, concurring in the result only, disagreed with Chief Justice TAYLOR and Justice CAVANAGH that this is not a lost-opportunity action, concluding instead that a lost-opportunity action is one in which it is possible that the bad outcome would have occurred even if the patient had received proper treatment. He also disagreed with Chief Justice TAYLOR that MCL 600.2912a(2) is unenforceable, concluding instead that all statutes are enforceable unless they violate the Michigan Constitution or the United States Constitution, which the statute at issue here does not. Finally, he disagreed with Justice CAVANAGH that MCL 600.2912a(2) only requires that the patient's *premalpractice* chance to obtain a better result be greater than 50 percent,

concluding instead that the *lost opportunity* must be greater than 50 percent. In order to determine whether the lost opportunity was greater than 50 percent, Justice MARKMAN would adopt a formula that generates the actual *percentage* lost rather than the number of *percentage points* lost and excludes those who would have achieved a good result regardless of the malpractice. Because Stone's lost opportunity in this case was greater than 50 percent, the result of the Court of Appeals judgment should be affirmed.

Ferris & Salter, P.C. (by *Don Ferris*), for the plaintiffs.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *Christina A. Ginter*) for the defendants.

Amici Curiae:

Kerr, Russell and Weber, PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*), for the Michigan State Medical Society.

Warner Norcross & Judd LLP (by *Matthew T. Nelson*, *Dean F. Pacific*, *John J. Bursch*, *Sarah A. Luke*, *Madelaine C. Lane*, and *Julie Lam*) for Michigan Defense Trial Counsel.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank* and *Geoffrey M. Brown*), for ProNational Insurance Company.

Smith Haughey Rice & Roegge (by *L. Roland Roegge* and *William L. Henn*) for the Michigan Health and Hospital Association.

Charfoos & Christensen, P.C. (by *David R. Parker*), for Roy Waddell, M.D.

Olsman Mueller, P.C. (by *Jules B. Olsman* and *Donna M. MacKenzie*), and *Richard E. Shaw* for Citizens for Better Care.

Mark Granzotto, P.C. (by *Mark Granzotto*), for the Michigan Association for Justice.

TAYLOR, C.J. In this case, the Court is called on to examine the doctrine of "lost opportunity" set forth in MCL 600.2912a(2), which prohibits recovery for the loss of an opportunity to survive or achieve a better result unless the opportunity was greater than 50 percent, and the construction of that statute in *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002). The Court of Appeals in this case considered the aggregate of complications plaintiff faced and concluded that plaintiff satisfied the statute, using *Fulton*'s requirement that the difference between his chance of a better result without malpractice and his chance of a better result despite the alleged malpractice was greater than 50 percentage points. I conclude that the second sentence of MCL 600.2912a(2) does not apply to this case. Moreover, I believe the second sentence is unenforceable because it provides no guidance regarding its meaning or how courts are to apply it. A medical-malpractice plaintiff must prove that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant. Because the evidence presented at trial would support the jury's verdict under my analysis, I conclude that there is no need to conduct a new trial and would therefore affirm the result of the Court of Appeals judgment but not its analysis.

I. FACTS AND PROCEEDINGS

Plaintiff suffered the rupture of an abdominal aortic aneurysm that had gone undetected despite physical examinations and testing by a number of physicians.[1]

[1] Throughout this opinion, "plaintiff" refers to Carl Stone; the claim of his wife, Nancy Stone, is derivative in nature.

He underwent emergency surgery to repair the rupture, but, in part because of preexisting conditions, amputation of both legs at mid-thigh was ultimately necessary. After surgery, plaintiff continued to experience multiple organ failure and other complications, including acute renal failure, sepsis, rhabdomyolysis, osteomyelitis, recurrent pancreatitis, and depression. His home required structural changes to accommodate his wheelchair and specialized needs, and his wife quit her employment to assist with his daily care needs.

Plaintiff brought a medical-malpractice suit against the radiologist and two vicariously liable entities on the theory that a negligent diagnosis resulted in the rupture and all resulting harm. At the jury trial, plaintiff presented experts who testified that, had the aneurysm been properly diagnosed, elective surgery could have been performed. Such elective surgery would have greatly increased plaintiff's chance of a better medical outcome, including a reduction of the risk of amputation and other health complications. Plaintiff's medical experts testified that a patient having elective surgery to repair an aortic aneurysm has a 95 percent chance of attaining a good result, which includes surviving the rupture, as well as avoiding additional medical complications. In contrast, misdiagnosed patients whose aneurysms rupture have only a 10 percent chance to achieve a good result. Specifically, the experts opined that 80 percent of patients with a rupture of an aortic aneurysm die, either en route to obtain medical care or during the emergency surgery. Of the 20 percent of patients with ruptures who manage to survive, 40 to 50 percent have some form of complication. This contrasts markedly with those undergoing elective repair, who face less than a 5 percent risk of dying or suffering serious complications.

Defendants argued that the risk of death should be factored out because plaintiff avoided it and that the risk of complications other than death was 5 to 12 percent for elective surgery and up to 40 percent for emergency surgery. Taking the numbers most favorable to plaintiff, 5 and 40, defendants argued that the difference was at best 35 percent. The specific risk of amputation suffered by plaintiff was 1 percent for elective surgery and 5 percent for emergency surgery: a paltry difference of 4 percent. The trial court disagreed with defendants' theory, however, and instructed the jury to consider the aggregate risk of complications.

The jury returned a verdict in favor of plaintiff for a total amount of $2,327,835. Following reduction for the damages cap[2] and collateral sources, the court entered a judgment in the amount of $1,936,682, of which $1,640,800 was for the verdict and the remainder was for interest, costs, and attorney fees. The trial court denied defendants' postjudgment motions for a new trial and judgment notwithstanding the verdict.

The Court of Appeals affirmed in an unpublished opinion per curiam, issued April 17, 2007 (Docket No. 265048). On the issue of "loss of opportunity," it agreed with the trial court that plaintiff had met the requirements of the statute because he had gone from a 95 percent chance of attaining a good result to a 10 percent chance of attaining a good result. *Id*. at 5. The Court considered the aggregate of all the increased risks that plaintiff faced as a result of the alleged malpractice and applied the *Fulton* formula to that aggregate risk.

This Court granted leave to appeal, directing the parties to address

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[2] MCL 600.1483.

(1) whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case; (2) if so, whether the "loss of an opportunity to survive or an opportunity to achieve a better result" should be determined by considering the aggregate increased risk posed by the alleged malpractice, including risks associated with injuries that the patient did not suffer and any increased risk of death, or whether the only consideration should be the increased risk of the specific injury or injuries suffered by the patient; (3) whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), was correctly decided, or whether a different approach is required to correctly implement the second sentence of § 2912a(2), such as that described in Roy W. Waddell, M.D.'s *A Doctor's View of Opportunity to Survive: Fulton's Assumptions and Math are Wrong*, published in the March 2007 edition of the Michigan Bar Journal at 32; and (4) whether the Court of Appeals erred when it determined that the plaintiffs met the requirements of § 2912a(2). [480 Mich 895 (2007).]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for judgment notwithstanding the verdict, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Similarly, we review de novo questions of statutory interpretation. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001). When interpreting a statute, the Court's primary goal is to give effect to the intent of the Legislature. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007). The first step is to review the language of the statute. *Id.* If the statute is unambiguous on its face, we presume that the Legislature intended the meaning expressed, and judicial construction is neither required nor permissible. *Id*. However, when a statute is ambiguous on its face—that is, equally

susceptible to more than a single meaning—judicial construction is appropriate to determine the meaning. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 164-166; 680 NW2d 840 (2004).

III. ANALYSIS

At issue in this case is subsection 2 of MCL 600.2912a, which reads:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%. [MCL 600.2912a(2).][3]

Although the lower courts did not question the applicability of the second sentence of MCL 600.2912a(2) to plaintiff's claim, treating it as one for loss of opportunity, this Court expressly requested the parties to address the issue. Plaintiff argues that he never pleaded his claim as one for loss of an opportunity; instead, his is a simple case of physical injury directly caused by negligence. In his brief, he asserts that a case involving a loss of opportunity occurs in very specific circumstances: "where a plaintiff cannot prove that the defendant's acts or omissions proximately caused his injuries, but can prove that the defendant's acts or omissions deprived him of some chance to avoid those injuries."

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[3] In addition, subsections 1(a) and (b) of the statute both include language requiring the plaintiff to show that, "as a proximate result of the defendant failing to provide [the appropriate standard of practice or care], the plaintiff suffered an injury." MCL 600.2912a(1)(a) and (b).

This definition is in accord with Michigan caselaw. In the first Michigan case to refer to the legal theory of "the value of lost chance," the Court of Appeals explained: "This theory is potentially available in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries." *Vitale v Reddy*, 150 Mich App 492, 502; 389 NW2d 456 (1986). The Court in *Vitale* noted that allowing such claims would expand existing common law, and it declined to do so, stating that such a decision "is best left to either the Supreme Court or the Legislature." *Id*. at 504. In a footnote, the Court observed that the wrongful-death statute, MCL 600.2922,

> requires proof that the wrongful acts or omissions were the cause of death. The statutory provision would not allow a plaintiff to recover in a situation where he could prove only that defendant's acts or omissions were the cause of a lost chance but could not prove that defendant's acts or omissions were the cause of death. [*Id.* at 504 n 4.]

In accord with this analysis, this Court has stated: "The lost opportunity doctrine allows a plaintiff to recover when the defendant's negligence *possibly*, i.e., [by] a probability of fifty percent or less, caused the plaintiff's injury." *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) (emphasis added).[4] The *Weymers* Court aptly described the lost-opportunity doctrine as "the antithesis of proximate cause." *Id*.[5] In cases in

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[4] Although this Court decided *Weymers* long after the statute at issue was enacted in 1993, the negligence alleged in *Weymers* occurred before 1993. Accordingly, the Court applied the common law rather than the statute.

[5] I agree with Justice CAVANAGH's reasoning and conclusion that Justice MARKMAN's definition of a lost-opportunity case is overbroad and inconsistent with the common-law meaning at the time MCL 600.2912a(2) was enacted. *Post* at 179-182. Long before *Falcon v Mem Hosp*, 436 Mich 443;

which the plaintiff alleges that the defendant's negligence more probably than not caused the injury, the claim is one of simple medical malpractice. *Id*. at 647-648.

In *Falcon v Mem Hosp,* 436 Mich 443; 462 NW2d 44 (1990), this Court first recognized a claim for lost opportunity to survive. *Falcon* was a wrongful-death case in which this Court allowed a claim to go forward even though the plaintiff's granddaughter would have had only a 37.5 percent chance of surviving a medical accident had she received proper care. Because proper medical procedures had not been followed, the granddaughter's chance of surviving the accident went to essentially zero. The lead opinion in *Falcon* admitted that the plaintiff could not show that the malpractice had more likely than not caused her granddaughter's death, but could show that it had caused her granddaughter to lose a "substantial opportunity of avoiding physical harm." *Id*. at 470 (LEVIN, J.). The lead opinion disavowed the traditional rule that requires a plaintiff to show that, but for the defendant's negligence, the patient would not have suffered the physical harm, saying that the "more probable than not standard, as well as other standards of causation, are analytic devices—tools to be used in making causation judgments." *Id*. at 451. Instead, despite the fact that the plaintiff could not show that the doctor's malpractice had more probably than not caused her granddaughter's death, the plaintiff had a claim because the malpractice did cause her granddaughter harm. The 37.5 percent chance for a better outcome was "hardly the kind of opportunity that any of us would willingly allow

462 NW2d 44 (1990), plaintiffs successfully brought actions for medical malpractice even though they had preexisting conditions or might have had a bad result despite being properly treated.

our health care providers to ignore." *Id*. at 460. This harm occurred *before* the granddaughter's death, at the moment "[w]hen, by reason of the failure to implement [certain] procedures," she was denied any opportunity of living. *Id*. at 469, 471 n 44. The lead opinion characterized its holding as requiring the plaintiff to show, more probably than not, that the malpractice reduced the opportunity of avoiding harm: "failure to protect [the granddaughter's] opportunity of living."[6] *Id*. at 469. Loss of her 37.5 percent opportunity of living, the lead opinion stated, "constitutes a loss of a substantial opportunity of avoiding physical harm." *Id*. at 470.

The lead opinion in *Falcon* thus concluded that the loss-of-opportunity claim accrued not when the patient died, but at the moment she went from having a 37.5 chance of survival to having no chance of survival. Under this theory, a plaintiff would have a cause of action independent of that for the physical injury and could recover for the malpractice that caused the plaintiff to go from a class of patients having a "good chance" to one having a "bad chance." Without this analysis, the plaintiff in *Falcon* would not have had a viable claim because it could not have been shown that the defendant more probably than not caused the physical injury. Until *Falcon*, medical-malpractice plaintiffs alleging that the defendant's act or omission hastened or worsened the injury (such as by failing to diagnose a condition) had to prove that the defendant's malprac-

[6] Only Justice ARCHER joined Justice LEVIN's lead opinion. Justice BOYLE wrote a concurrence, joined by Justice CAVANAGH, that agreed that tort law should allow a claim for "lost opportunity to survive" when "the negligence of the defendant more probably than not caused the loss of opportunity." *Falcon, supra* at 472-473 (BOYLE, J., concurring). However, the concurrence noted that "any language in the lead opinion suggesting that a similar cause of action might lie for a lost opportunity of avoiding lesser physical harm is dicta." *Id*. at 473.

tice more probably than not was the proximate cause of the injury. See, e.g., *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990); *Naccarato v Grob*, 384 Mich 248, 252; 180 NW2d 788 (1970); *Skeffington v Bradley*, 366 Mich 552; 115 NW2d 303 (1962).

When the Court decided *Falcon*, MCL 600.2912a read:

> In an action alleging malpractice the plaintiff shall have the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

Three years after *Falcon*, the Legislature enacted 1993 PA 78, amending MCL 600.2912a to add the second subsection. In its entirety, the statute as amended reads:

> *(1) Subject to subsection (2),* in an action alleging malpractice, the plaintiff *has* the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice *or care* in the community in which the defendant practices or in a similar community, and that as

a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

(b) The defendant, if a specialist, failed to provide the recognized standard of *practice or* care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

(2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%. [New language emphasized.]

As can be seen, the Legislature retained the already-existing language, making it subsection 1 of the statute. Both subsection 1(a) and subsection 1(b) require the plaintiff to show that, "as a proximate result of the defendant failing to provide [the appropriate standard of practice or care], the plaintiff suffered an injury." Further, the Legislature added subsection 2. Specifically, the first sentence of this new subsection codifies and reiterates the common-law requirement that a plaintiff show that the defendant's malpractice more probably than not caused the plaintiff's injury. The second sentence of subsection 2 adds that, in medical-malpractice cases, a "plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." However, one must keep in mind that the relevant caselaw when subsection 2 was enacted held that the lost-opportunity doctrine applies "*in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries . . . .*" *Vitale, supra* at 502

(emphasis added). That is, the first sentence of subsection 2 requires plaintiffs in every medical-malpractice case to show the defendant's malpractice proximately caused the injury while, at the same time, the second sentence refers to cases in which such proof not only is unnecessary, but is impossible. Accordingly, I conclude that the two sentences of subsection 2 create a paradox, allowing claims in the second sentence while precluding them by the first sentence.

While it is tempting to argue, as Justice CAVANAGH does, that the Legislature intended to allow as an "injury" a plaintiff's lost chance alone, without proof of physical injury, this Court addressed that issue in *Wickens*. In *Wickens*, *supra* at 60, the Court stated that the first sentence of subsection 2 "expressly limits recovery to injuries that have already been suffered and more probably than not were caused by the defendant's malpractice." A reduction of a person's chances of avoiding injury is not itself a present injury, but is only an indication of the likelihood of suffering a future injury. *Id.* at 60-61. Therefore, because of the statutory present-injury requirement, the plaintiff in *Wickens* could not recover for her reduced expected life span—the exact kind of injury that *Falcon* allowed. Moreover, it has never been the law in this state that a negligence suit can be sustained when the alleged negligence did not cause a physical injury to a person or property. *Henry v Dow Chem Co*, 473 Mich 63, 75-76; 701 NW2d 684 (2005). The Legislature would have understood that this is what the term "injury" encompassed when it enacted the language reiterating this traditional requirement: the plaintiff must have an *injury* proximately caused by the defendant.[7] *Ford Motor Co v City*

[7] While *Falcon* superficially recognized this, it determined that the patient's death, which could not be said to have been caused by the

of Woodhaven, 475 Mich 425, 439-440; 716 NW2d 247 (2006). Thus, what the Legislature intended by the statute was likely something more traditional: a situation in which an injury might have occurred anyway, but in which the defendant's act or omission hastened or worsened it in such a way that the plaintiff suffered more severe physical injury than he or she would have had the negligence not occurred. As noted, before *Falcon*, such cases were litigated under the ambit of traditional medical-malpractice law.[8]

In my view, there is little question that the statute cannot be interpreted as written. Avoiding the underlying paradox of the statute allowing in one sentence suits that in another sentence it precludes, the Court of

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doctor's malpractice, was the physical injury she suffered. By permitting the plaintiff to recover for a different injury (loss of an opportunity to survive), the Court ignored the fundamental requirement that a tort plaintiff must suffer a physical injury that was caused by the defendant's negligence. Instead of clarifying that it was significantly redefining "injury" in a wholly new way, the lead opinion in *Falcon* first focused almost completely on relaxing the burden of proof regarding causation. See, e.g., *Falcon, supra* at 449-453 and nn 5 and 6, 455-457 (LEVIN, J.). Then it recited foreign cases holding that a reduction in chances is a compensable injury and determined that to be sound. *Id.* at 461-468. The opinion did not appear to recognize that this was contrary to a considerable body of existing Michigan caselaw. See *id.* at 494 (RILEY, J., dissenting) ("'The recovery of damages for the loss of a mere chance eviscerates the principles that underlie our tort law.").

[8] Justice CAVANAGH asserts that a plaintiff cannot claim a lost opportunity "unless [the] plaintiff suffered a verifiable *loss*." *Post* at 172 n 2. Justice MARKMAN appears to agree with him that a bad result must occur, otherwise the opportunity has not been lost. *Post* at 197. Certainly, in such cases the defendant's conduct might have increased the likelihood of a bad result. Yet if the plaintiff is unable to show that the defendant's negligence caused the bad result, how can he or she nonetheless show that the defendant's negligence caused the opportunity to be lost? This is the heart of the problem with allowing loss-of-opportunity claims: either the patient has a concrete injury, in which case he or she should be required to prove causation, or the plaintiff does not, in which case the defendant should not be held liable. See *Henry, supra* at 75-76.

Appeals, interpreting the second sentence by itself in *Fulton*, found two possible, and fully contradictory, constructions, each of which could be achieved only by adding words to the statute. The *Fulton* Court expressed the issue before it as whether the second sentence of the statute requires a plaintiff to show "only that the *initial* opportunity to survive before the alleged malpractice was greater than fifty percent . . . or, instead, that the opportunity to survive was *reduced by* greater than fifty percent because of the alleged malpractice . . . ." *Fulton, supra* at 77-78 (emphasis added). The Court noted that the statute was ambiguous because reasonable minds could differ regarding which of these meanings could be read from the words of the statute. The Court concluded that the first interpretation required that the word "initial" be inferred to modify "opportunity" and that the second required that the words "loss of" be inferred to modify "opportunity." *Id*. at 80. Apparently finding itself obligated to choose one of these two interpretations, the Court then decided that the second construction was the one intended by the Legislature because it reflected the Legislature's rejection of *Falcon*.[9] The Court asserted that the lead opinion in *Falcon* had focused on the "extent of the loss" and that the Legislature was insisting on a greater loss for the claim to be actionable. Id. at 82-83. However, *Falcon*'s focus was almost entirely on the plaintiff's initial opportunity being substantial, and so it is *equally* plausible that the Legislature merely intended for a plaintiff to have an initial opportunity of more

[9] I agree with Justice CAVANAGH, *post* at 174, that Justice MARKMAN's interpretation (and that of *Fulton*) improperly adds to the statute the words "loss of," effectively replacing the word "opportunity" where it is used the second time with the phrase "loss of opportunity." The only basis for adding this language is the simple desire to make the statute so read.

than 50 percent. Both interpretations proposed in *Fulton* implicate a negative reaction to *Falcon*, and nothing in the statutory language, the statutory context, or the statute's history gives any further clues to assist in choosing the "correct" interpretation.

It is confounding to attempt to ascertain just what the Legislature was trying to do with this amendment. Even if it was trying to create a remedy for the "injury" of a reduction in chances following medical malpractice, by imposing the threshold of greater than 50 percent it may well have eliminated most of the cases that might benefit from such a rule. For example, if the patient in *Falcon* had enjoyed a greater than 50 percent initial likelihood of survival (that is, she was not likely to die even with proper treatment), the plaintiff probably would have brought a standard medical-malpractice case, and the jury would have decided proximate cause in the usual way. It was only because the plaintiff could not show that the patient more probably than not would have survived but for the doctor's negligence that prompted the plaintiff to seek her remedy under the doctrine of lost opportunity.

As written, the second sentence of MCL 600.2912a(2) can be made understandable only by adding words or by redefining "injury" in a way significantly contrary to the mass of caselaw at the time the sentence was added. Another possible alternative reading is that the second sentence of subsection 2 was intended not to create a new type of claim, but to limit courts from expanding the common law so far as to allow cases like *Falcon*. None of these multiple, contradictory interpretations can be shown to be the "correct" construction of legislative intent. Choosing between them can only be a guess. Moreover, it remains that the second sentence impossibly conflicts with the requirement of a proxi-

mate cause of the injury in both the first sentence of subsection 2 and in subsection 1. Accordingly, I conclude that the second sentence of subsection 2 cannot be judicially enforced because doing so *requires* the Court to impose its own prerogative on an act of the Legislature.[10]

I find the second sentence of MCL 600.2912a(2), as written, substantially incomprehensible because (1) it either cannot be harmonized with the proximate-cause requirement of the rest of the statute or creates by implication a new cause of action contrary to common law and (2) it provides no guidance regarding its correct application. The remaining portions of MCL 600.2912a should continue in effect. MCL 8.5.

This would leave, for medical-malpractice claims, the requirement imposed by the statute that "the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." MCL 600.2912a(2).[11] In addition, the word "injury" would continue to retain its meaning in tort of a present physical injury to person or property. I believe that, by codifying and restating the requirements of causation and injury in existence at the time *Falcon* was decided, the Legislature effectively overruled *Falcon* and reinstated the traditional elements of medical-malpractice claims.

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[10] See, e.g., *Mini Spas, Inc v State*, 657 P2d 1348, 1350 (Utah, 1983) (refusing to rewrite "by judicial intervention" an act purporting to create a regulatory board because the act "cannot be implemented as written" and stating that "[p]laintiff must seek a solution to this problem from the Legislature"); *Warren v Branan*, 109 Ga 835, 840; 35 SE 383 (1900) (holding that the provisions of an act seeking to establish the geographical limits of a town "are so indefinite, uncertain, and incomplete that the legislative intent can not be ascertained and given effect, and that therefore the act is wholly inoperative").

[11] Even if we were to strike both sentences of subsection 2, the proximate-cause requirement would remain in subsection 1.

In accord with my conclusion that the second sentence of MCL 600.2912a(2) is incomprehensible as written, I would hold that *Fulton*'s construction of that part of the statute is no longer good law.[12] I believe that the Legislature intended to retain the traditional proximate-cause requirement in effect before *Falcon* and that that is what a plaintiff must prove.[13]

IV. APPLICATION

Although I believe that the lower courts erred by applying *Fulton* and that the trial court incorrectly instructed the jury on the issue of whether plaintiff had shown that defendant's negligence caused him to lose a greater than 50 percent chance of a better result, I would conclude that it is not necessary to order a new trial. For each defendant, the trial court instructed the jury that it had to find by a preponderance of the evidence (1) that the defendant was professionally negligent, (2)

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[12] Moreover, to the extent it could be considered as providing a method of determining proximate cause in failure-to-diagnose cases, I believe that *Fulton* was incorrectly decided. *Fulton*'s simplistic formula fails to consider that some patients would achieve a good result *regardless* of whether they received proper or improper treatment and, conversely, that some patients would achieve an unfavorable result regardless of the quality of their treatment. In any formula assessing causation, patients who would have had a favorable outcome regardless of treatment need to be taken out of the equation. See, e.g., Waddell, *A doctor's view of "opportunity to survive"*: Fulton's *assumptions and math are wrong*, 86 Mich B J 32 (March 2007). Accordingly, I agree with Justice MARKMAN that Waddell's formula is one method of accurately assessing causation in cases in which there are multiple possible contributing causes.

[13] I agree with Justice MARKMAN that if the Legislature desires to allow a cause of action for lost opportunity, it should do so in a way that clearly indicates when such claims are allowed and how they should be analyzed. *Post* at 218 n 26. For example, *Falcon*'s analysis was based on a method found in King, *Causation, valuation, and chance in personal injury torts involving preexisting conditions and future consequences*, 90 Yale L J 1353 (1981), which identified several ways of analyzing lost-opportunity claims.

that plaintiff sustained injury and damages, and (3) that the professional negligence or malpractice of that defendant was a proximate cause of the injury and damages. After giving these instructions, the court further instructed the jury: "I'm going to talk about damages. In an action alleging claims of professional negligence against a physician, even if you find professional negligence, the Plaintiff cannot recover unless the Plaintiff's chance of having a better result was changed by greater than 50 percent." Thus, after being instructed that it had to find the traditional elements of medical malpractice and, in addition, had to find that plaintiff had lost an opportunity of greater than 50 percent, the jury returned a verdict indicating it had found that all these elements were satisfied. Indeed, a review of the record shows that plaintiff suffered amputations and other injuries, and from the testimony presented the jury could have concluded that it was more likely than not that the amputations and other injuries were caused by the defendants' negligence and would not have occurred absent that negligence. Most importantly, regardless of the jury's finding of lost opportunity, it is clear from the way the instructions were given that the jury found that the traditional elements were met: defendants' negligence more probably than not caused plaintiff's injuries. Thus, I believe that the jury properly found that plaintiff had satisfied the causation and injury elements. Accordingly, I would hold that reversal is not required and would affirm the result of the judgment of the Court of Appeals.

V. SUMMARY

In an attempt to clarify for the reader the majority and minority positions on each issue, I provide the following summary:

All seven justices would affirm the result of the Court of Appeals decision and the judgment for plaintiff. Six of the justices believe that this is not a lost-opportunity case; Justice MARKMAN would hold that it is such a case. All seven justices believe that *Fulton*'s analysis is incorrect or should be found to no longer be good law, though their reasons for doing so vary.[14] Justices CORRIGAN and YOUNG and I would find that *Fulton* is no longer good law because we would hold that the statute is unenforceable as written. Justice MARKMAN would hold that *Fulton* is inconsistent with the statutory language. Justices WEAVER, CAVANAGH, and KELLY would hold that *Fulton* is incorrect because it erroneously added words to the statute when analyzing the phrase "the opportunity." Of the four justices holding that the statute is not unenforceable as written (Justices WEAVER, CAVANAGH, KELLY, and MARKMAN), only Justice MARKMAN would define the term "opportunity" in accordance with the Waddell article, while the other three (Justices WEAVER, CAVANAGH, and KELLY) would define it in accordance with *Falcon*, but with a higher threshold than *Falcon* required. The same four justices (Justices WEAVER, CAVANAGH, KELLY, and MARKMAN) would hold that loss of the opportunity is, by itself, a compensable injury, although the opportunity must be "lost"—that is, the bad result must occur—in order for a claim to accrue.

Given this montage of issues and positions created by the language of this statute, it would be helpful for the

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[14] However, because a majority of justices hold that this is not a lost-opportunity case, the issue of the correctness of *Fulton* cannot be reached, and *Fulton*'s approach remains undisturbed as the method of analyzing lost-opportunity cases. Nonetheless, because the patient in *Fulton* would likely have survived had she received a timely diagnosis, I would assert that the claim should have been treated as one for ordinary medical malpractice and that the lower courts erred in applying to it the doctrine of lost opportunity.

Legislature to reexamine its goal and the policies it wishes to promote and strive to better articulate its intent in that regard.

CORRIGAN and YOUNG, JJ., concurred with TAYLOR, C.J.

CAVANAGH, J. I agree with Chief Justice TAYLOR that the evidence presented in this case supports a traditional medical-malpractice claim; thus, I concur that the jury's verdict should be upheld. However, I do not agree with the conclusion that the second sentence of MCL 600.2912a(2) is incomprehensible and unenforceable. Therefore, I respectfully disagree with Chief Justice TAYLOR's analysis of that provision.

Chief Justice TAYLOR identifies two problems with MCL 600.2912a(2) that he believes render it partially unenforceable: (1) the first and second sentences conflict and (2) the second sentence is incomprehensible. I disagree, because the circumstances of the 1993 amendment of this statute clarify the meaning of the statutory language and resolve both concerns.

THE ORIGINS OF THE LOSS-OF-OPPORTUNITY DOCTRINE

The history of the loss-of-opportunity doctrine is highly relevant to the interpretation of MCL 600.2912a(2) because this Court's adoption of the doctrine evidently prompted the Legislature to add that provision. In *Falcon v Mem Hosp*, 436 Mich 443; 462 NW2d 44 (1990), this Court first recognized the loss-of-opportunity doctrine.[1] *Falcon* involved a wrongful-

[1] Justice LEVIN wrote *Falcon*'s lead opinion, which Justice ARCHER signed. I joined Justice BOYLE's opinion, which concurred in the recognition of the loss-of-opportunity cause of action, but clarified that we were only called upon to determine whether such claims exist when the ultimate harm is death. Thus, a majority of this Court agreed on the

death claim brought on behalf of a woman who had suffered an amniotic embolism during childbirth. As in all negligence cases, the plaintiff was required to show causation to establish a valid medical-malpractice claim. *Falcon* discussed various causation theories. Some courts have required a plaintiff to establish "that it is more probable, measured as more than fifty percent, that, but for such negligence, the patient would not have suffered the physical harm." *Id.* at 449 (LEVIN, J.). *Falcon* termed this the "more probable than not standard." *Id.* at 451. Under this standard, "a plaintiff who establishes that the patient would have had more than a fifty percent opportunity of not suffering physical harm had the defendant not acted negligently, recovers one hundred percent of the damages." *Id.* at 450. The plaintiff in *Falcon* could not have maintained a wrongful-death action under the more-probable-than-not standard—the decedent only had a 37.5 percent chance of surviving even without the alleged malpractice, so it was not more probable than not that the physician's malpractice caused the decedent's death. *Id.* at 460.

While the plaintiff in *Falcon* could not recover for the injury of her granddaughter's wrongful death, we ruled that the plaintiff nevertheless had a different cause of action available to her. *Falcon* adopted the approach taken by other courts that recognized "*loss of an opportunity* for a more favorable result, *as distinguished from the unfavorable result*, as compensable in medical malpractice actions." *Id.* at 461 (emphasis added). "Under this approach, damages are recoverable for the loss of opportunity although the opportunity lost

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fundamental principles of the loss-of-opportunity doctrine, although Justice BOYLE and I would have limited the discussion to the harm that the *Falcon* plaintiff suffered—death.

was less than even, and thus it was not more probable than not that the unfavorable result would or could have been avoided." *Id*. at 461-462. Thus, the *Falcon* decision explicitly recognized loss of an opportunity to avoid physical harm as a distinct *injury*. A plaintiff could bring a claim for loss of an opportunity to avoid death, even if she could not maintain a claim for the death itself because she could not establish causation for the death.

Falcon's approach to calculating damages for a loss-of-opportunity claim also indicates that it treated the lost opportunity as a distinct injury, not simply a direct physical-harm injury that enjoyed a lower causation standard. Because the plaintiff's granddaughter in *Falcon* allegedly lost a 37.5 percent chance of survival, we concluded that the appropriate measure of damages would be "37.5 percent times the damages recoverable for wrongful death . . . ." *Id*. at 471. Thus, generally speaking, " '[t]he proper computation of damages would limit the damages recoverable to only that amount of reduced chance of recovery actually caused by the physician's negligent conduct.' " *Id*. at 472 n 47 (citation omitted). We consulted *Mays v United States*, 608 F Supp 1476, 1482-1483 (D Colo, 1985), for its method of computing damages attributable to the defendant. *Falcon,* 436 Mich at 471-472 (LEVIN, J.). In *Mays*, malpractice had reduced the patient's opportunity to survive from 40 to 15 percent, so the court computed the damages by multiplying the opportunity lost (40 minus 15) by the net pecuniary loss to determine the damages for the harm caused by the defendant. *Id*. Calculating the damages this way permitted the plaintiff "to recover damages only for the reduction in the patient's opportunity of survival." *Id*. at 472. This calculation isolates the value of the injury that can be causally linked to a defendant's negligence—the loss

of an opportunity. The value of a loss-of-opportunity claim is measured by the *extent* of the loss; so, clearly, the injury being compensated is the loss of a particular amount of opportunity. By contrast, the measure of damages in a traditional claim for wrongful death or physical harm is, generally speaking, the value of damages attributable to the death or physical harm; as such, the injury being compensated is the death or physical harm.

In sum, when *Falcon* adopted the loss-of-opportunity doctrine, it recognized that the injury of loss of an opportunity was distinct from the injury of suffering the associated physical harm—which, in that case, was death. However, *Falcon* indicated that not all losses of opportunity were actionable; rather, a plaintiff must suffer the loss of a *substantial* opportunity for a better result. "The cause of action accrues when harm and damages result from the loss of a substantial opportunity for a better result." *Id*. at 470 n 43. We concluded "that loss of a 37.5 percent opportunity of living constitutes a loss of a substantial opportunity of avoiding physical harm," but declined to "decide what lesser percentage would constitute a substantial loss of opportunity" in other circumstances. *Id*. at 470.

Finally, *Falcon* emphasized that a loss-of-opportunity cause of action was not exempt from the more-probable-than-not standard of causation. "Under this approach, the plaintiff must establish more-probable-than-not causation. He must prove, more probably than not, that the defendant reduced the opportunity of avoiding harm." *Id*. at 462. Unlike a claim for wrongful death or physical injury, the "patient . . . need not show that it was probable, measured as more than fifty percent, that the course of the disease and treatment would have been different." *Id*. at 470 n 43. Instead, "[i]t is suffi-

cient to show, more probably than not, that had there been a correct diagnosis, the patient would have had a substantial opportunity of avoiding the course of the disease and treatment that occurred." *Id*. Therefore, while a claim for loss of opportunity addresses a different injury than a cause of action for the physical injury itself, it is still subject to the same standard of proof of causation.

Falcon's enunciation of the loss-of-opportunity doctrine is significant, because it apparently provoked the Legislature to amend MCL 600.2912a. In 1993, the Legislature amended that provision by adding a second subsection, which states:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%. [MCL 600.2912a(2).]

The amendment was widely understood to be a direct reaction to the *Falcon* decision. As a majority of this Court noted, after *Falcon* adopted the lost-opportunity doctrine, "[o]ur Legislature immediately rejected *Falcon* and the lost opportunity doctrine. MCL 600.2912a(2) . . . ." *Weymers v Khera*, 454 Mich 639, 649; 563 NW2d 647 (1997). I agree that the amendment of MCL 600.2912a(2) was a reaction to *Falcon*, but I would not characterize it as a rejection of the lost-opportunity doctrine entirely. It merely established the threshold for loss-of-opportunity claims.

THE PROPER INTERPRETATION OF MCL 600.2912a(2)

The Legislature's addition of MCL 600.2912a(2) should be read in light of the *Falcon* decision. This

Court follows the principle that when a statute uses a common-law term and there is no clear legislative intent to alter the common law, the term will be interpreted as having the same meaning as at common law. *Ford Motor Co v City of Woodhaven,* 475 Mich 425, 439; 716 NW2d 247 (2006). Additionally, the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation. *Id*. at 439-440. In this instance, the Legislature appears to have reacted to a particular opinion of this Court, so that opinion's holdings offer considerable insight into the Legislature's intent. When interpreting MCL 600.2912a(2), then, it is important to keep in mind several principles established by the *Falcon* decision: (1) loss-of-opportunity claims are subject to the more-probable-than-not standard for proving causation, (2) the "injury" in a loss-of-opportunity claim is the loss of a substantial opportunity to avoid physical harm, not the actual physical harm itself, and (3) loss of a 37.5 percent opportunity of living constitutes a compensable loss of a substantial opportunity to avoid physical harm. Chief Justice TAYLOR interprets MCL 600.2912a(2) without considering these principles from *Falcon*, and thus comes to the mistaken conclusion that the statute is unenforceable and inconsistent with the lost-opportunity doctrine.

The first sentence of MCL 600.2912a(2) assigns a medical-malpractice plaintiff "the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." Chief Justice TAYLOR concludes that this sentence precludes lost-opportunity claims because those claims only arise when a plaintiff cannot prove that a defendant's negligence more probably than not caused the plaintiff's injury. *Ante* at 157. But this overlooks two principles gleaned from *Falcon* that the Legislature would have been aware of while drafting this sentence: loss-of-opportunity claims are

subject to the more-probable-than-not standard of causation and, in such claims, the "injury" is the loss of an opportunity to avoid the physical harm, not the associated physical harm itself. When the first sentence of MCL 600.2912a(2) is interpreted according to *Falcon*'s articulation, its causation requirement does not preclude claims for loss of opportunity. It simply codifies the causation requirement that applies to claims for the injury of suffering physical harm as well as claims for the injury of the loss of an opportunity to avoid physical harm. Just like *Falcon*, MCL 600.2912a(2) requires that a plaintiff asserting a cause of action for loss of opportunity prove that the defendant more probably than not caused the loss of an opportunity to survive or the loss of an opportunity to achieve a better result.

The first sentence of MCL 600.2912a(2) should also be interpreted in accordance with *Falcon*'s understanding of the word "injury." In medical-malpractice cases, the underlying injury is quite often death or some physical harm. But *Falcon* identified a distinct injury in medical-malpractice cases—the loss of a substantial opportunity to avoid physical harm. This is significant, because a lost-opportunity plaintiff, by definition, cannot prove that a defendant's malpractice more probably than not caused the patient to suffer physical harm or death. Take the example of a patient who before treatment had a 40 percent chance of survival as the result of a preexisting condition. If that patient died after being negligently treated by a physician, the plaintiff would not be able to prove that the physician's malpractice more probably than not (50 percent or greater) caused the patient's death. There was a 60 percent chance that the patient would have died regardless of the malpractice, as a result of the preexisting condition. But the plaintiff might be able to show that the physician's malpractice more probably than not caused the

patient to lose up to a 40 percent chance of avoiding death.[2] The first sentence of MCL 600.2912a(2) simply places this burden to prove causation on a plaintiff, whether the alleged injury is the physical harm itself or the loss of an opportunity to avoid harm.

Moreover, the explicit recognition of the loss-of-opportunity doctrine in the second sentence of MCL 600.2912a(2) supports the conclusion that the Legislature did not intend to preclude lost-opportunity claims by adopting the more-probable-than-not standard of causation. The second sentence states: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." MCL 600.2912a(2). If the Legislature had intended to reject the lost-opportunity doctrine, it would have entirely prohibited plaintiffs from recovering for a loss of an opportunity. Instead, it permitted recovery for loss of an opportunity under certain circumstances—if the opportunity was greater than 50 percent. This sentence merely sets the threshold for invoking the loss-of-opportunity doctrine. It requires that a plaintiff's premalpractice opportunity to survive or achieve a better result was greater than 50 percent.[3]

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[2] Chief Justice TAYLOR's concern that redefining "injury" in this way would permit recovery for a "lost chance alone, without proof of physical injury" is unfounded. *Ante* at 157. By definition, one does not suffer the loss of an opportunity to survive unless death occurs. Otherwise, there would have been no opportunity lost. Similarly, a claim for the loss of an opportunity to achieve a better result does not arise unless a plaintiff suffered a verifiable *loss*. The loss is the injury that the lost-opportunity doctrine recognizes. Typically, proof of an actionable loss will involve actual physical harm suffered by the plaintiff. Defining injury as such will not allow a plaintiff to recover for a potential future injury.

[3] For example, a patient who had a premalpractice opportunity to survive of 60 percent, and whose chance of survival was reduced to 20

The conclusion that the first and second sentences of MCL 600.2912a(2) do not conflict is also related to the proper interpretation of the second sentence. Chief Justice TAYLOR identifies an ambiguity in the second sentence that, he contends, can only be resolved by adding words or by redefining the term "injury." *Ante* at 160.[4] The Court of Appeals also identified this ambiguity in *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002). *Fulton* described the ambiguity: the second sentence of the statute requires a plaintiff to show either that the *premalpractice* opportunity was greater than 50 percent or that the opportunity was *reduced* by more than 50 percent. *Id*. at 77. In short, the ambiguous term is the statute's second use of the word "opportunity." I disagree with the conclusion that none of the multiple, contradictory interpretations can be shown to be the correct construction of legislative intent. While reasonable minds could differ with respect to the meaning of this statute, the correct interpretation can be discerned by conventional means of construction.

The proper interpretation of the second use of the word "opportunity" in MCL 600.2912a(2) can be resolved by simply considering the entire text of the sentence. The first time "opportunity" is used, the statute speaks of recovery for "loss of an opportunity to survive." MCL 600.2912a(2). By using this term from

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percent because of malpractice, would have a cause of action for loss of opportunity to survive if he ultimately died. The plaintiff in that case would not have a wrongful-death action because it was not more probable than not that the negligence caused the patient's death. But he could have a cause of action for the loss of a 40 percent opportunity to survive, because the patient's premalpractice opportunity to survive was greater than the threshold of 50 percent.

[4] I disagree with the premise that a statute is ambiguous only if it is equally susceptible to more than one meaning.

Falcon without modification, the Legislature adopted *Falcon*'s articulation of the lost-opportunity cause of action. And we know from *Falcon* that by the very nature of a lost-opportunity claim, the opportunity alleged to have been lost must be the premalpractice opportunity. The word "opportunity" in the phrase "loss of an opportunity" must refer to the premalpractice opportunity because that is the opportunity that is lost in some measure and, thus, creates a claim.

The second time "opportunity" is used in the sentence, it is not preceded by the phrase "loss of an." But the statute's replication of the term "opportunity" within the same sentence clearly indicates that they relate to each other and are to be construed identically. Thus, the term "opportunity" in isolation has the same meaning that it does within the phrase "loss of an opportunity to survive." Accordingly, a plaintiff cannot recover for the loss of an opportunity unless *the* opportunity—the premalpractice opportunity that was allegedly lost in some measure—was greater than 50 percent. Thus, this interpretation does not require that any words be added to the sentence; it merely requires the word "opportunity" to be construed consistently within the same sentence.

The other proposed meaning of the statute's second use of the word "opportunity" would conflict with the sentence's first use of the word. Instead of reading the phrase "unless the opportunity was greater than 50%" as written, this interpretation would infer the words "loss of" in front of "opportunity." Justice MARKMAN advocates this interpretation. He concludes that "the opportunity" clearly refers back to the "loss of an opportunity," and thus the sentence means that the loss of the opportunity must be greater than 50 percent. *Post* at 195. But this interpretation conflates the phrase

"loss of an opportunity" with the phrase "the opportunity." It assumes that the Legislature used the phrase "the opportunity" as a shorthand reference for "loss of an opportunity" and requires the reader to infer the phrase "loss of" before the second use of the word "opportunity." This interpretation is less plausible than my interpretation, which gives the term "opportunity" the same meaning regardless of whether it appears alone or within the phrase "loss of an opportunity," and does not require reading language into the statute.[5] In sum, I cannot conclude that this competing interpretation is correct when it poses linguistic problems that are not found in the other interpretation.

Moreover, interpreting the word "opportunity" to mean premalpractice opportunity comports with the purpose of the statute and the context in which it was adopted, while the other interpretation does not. *Falcon* adopted the loss-of-opportunity doctrine to provide a cause of action to plaintiffs who could not establish causation for physical harm, but could establish causation for the loss of a substantial opportunity to avoid that physical harm. MCL 600.2912a(2) cannot limit

[5] Justice MARKMAN denies that he reads words into the statute. *Post* at 195 n 10. But it is telling that Justice MARKMAN has solved the inference problem present in his interpretation by repeatedly misquoting the statute. For example, he reports that MCL 600.2912a(2) "states that the 'lost opportunity' must be greater than 50 percent . . . ." *Post* at 195 n 10. He repeats that MCL 600.2912a(2) "requires that the 'lost opportunity' be 'greater than 50%' " in another portion of his opinion, *post* at 196, and later states that MCL 600.2912a(2) "only allows a plaintiff to recover for a 'loss of an opportunity' that was 'greater than 50%,' " *post* at 197. The selective positioning of these phrases artfully suggests that the statute actually says that the *lost* opportunity must be greater than 50 percent. But, in fact, the statute simply requires that "*the opportunity* was greater than 50%." MCL 600.2912a(2) (emphasis added). The fact that Justice MARKMAN is compelled to recharacterize the text of the statute in this way strongly suggests that his interpretation infers the word "lost" before the word "opportunity."

recovery for the loss of an opportunity to cases in which the loss was greater than 50 percent, because any plaintiff who satisfied that condition would have a traditional medical-malpractice claim for the death or physical harm itself.[6] A plaintiff who can show that malpractice caused the loss of a more than 50 percent opportunity to avoid death or physical harm can meet the more-probable-than-not standard of causation for the associated death or physical harm. This interpretation would permit a loss-of-opportunity claim when a

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[6] Justice MARKMAN asserts that I am incorrect on this point because, for example, plaintiff in this case can show that he lost an 80 percent opportunity to achieve a better result (no amputation), but "cannot prove that defendant's malpractice caused the amputation, as he would be required to do in a traditional medical-malpractice action . . . because there was at least a 1 percent chance that plaintiff would have suffered an amputation even with proper treatment." *Post* at 214. From this argument, it would appear that Justice MARKMAN believes that medical-malpractice actions require a plaintiff to prove that a defendant's negligence was a 100 percent cause of his injury. However, we have explained that the element of "cause in fact" in negligence does not require a plaintiff to "prove that an act or omission was the *sole* catalyst for his injuries . . . ." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004). Rather, a plaintiff "must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Id*. This is consonant with the caselaw of other jurisdictions, and holds true regardless of whether a plaintiff's preexisting condition was a possible cause of his injury. In medical-malpractice cases,

> the courts have uniformly adopted the position that *proof of causation does not require that it be shown that the patient was certain to have recovered or improved with sound medical care*, and it has often been said that the plaintiff may sustain the burden of establishing proximate causation with evidence that it was probable, or more likely than not, that the patient would have been helped by proper treatment. [Anno: *Medical malpractice*: *"Loss of chance" causality,* 54 ALR4th 10, 18 (emphasis added).]

The Legislature codified this position in MCL 600.2912a(2), which gives the plaintiff the burden of proving that the defendant's negligence more probably than not proximately caused his injury.

plaintiff's chance for survival was reduced from 80 percent to 20 percent, but not when the plaintiff's chance for survival was reduced from 80 percent to 40 percent. It would not make sense to permit a plaintiff whose chance of survival was reduced from 80 percent to 20 percent to bring a lost-opportunity claim, because that plaintiff could show that the negligence more probably than not caused the death, thus establishing a traditional wrongful-death claim. Meanwhile, the statute would deny recovery for the loss of an opportunity to a plaintiff who suffered death, but could only show that the malpractice reduced his opportunity to survive from 80 percent to 40 percent. The plaintiff in that case would be left with no cause of action at all; he could not meet the more-probable-than-not standard of causation for the injury of death, and he would be precluded from bringing a lost-opportunity claim because he lost only 40 percent of his opportunity. This cannot be the result intended by the Legislature. This interpretation of the statute would prevent *Falcon*'s intended class of plaintiffs from bringing a loss-of-opportunity claim, while still recognizing a cause of action for loss of opportunity. It would provide a class of plaintiffs who already have a traditional medical-malpractice cause of action with an additional cause of action for loss of opportunity. Such a result is illogical in light of one significant purpose of the statute—to codify the loss-of-opportunity doctrine recognized in *Falcon*.

Finally, interpreting the statute as referring to the premalpractice opportunity is consistent with the history of the amendment. That is, MCL 600.2912a(2) is understood to be a legislative reaction to *Falcon*. MCL 600.2912a(2) retained the loss-of-opportunity doctrine, so it could not have been intended to entirely preclude the class of plaintiffs recognized by *Falcon* from bringing such claims; such a drastic step would be entirely at

odds with the rationale of the loss-of-opportunity doctrine. Rather, MCL 600.2912a(2) retained the doctrine, but set the threshold at 50 percent, so that only plaintiffs who had a greater than 50 percent premalpractice opportunity to survive or achieve a better result could bring a claim. This interpretation is the only reasonable explanation for the Legislature's action—it aligns with the Legislature's apparent intent to both endorse the doctrine and place a limit on it. In sum, I concur with Chief Justice TAYLOR that plaintiff in this case proved a traditional medical-malpractice claim based on his physical injuries and that the jury's verdict should be upheld.[7] Plaintiff did not assert, or need to resort to, a claim for loss of opportunity. However, I disagree that the second sentence of MCL 600.2912a(2) is substantially incomprehensible. The correct interpre-

[7] There was adequate evidence that the doctor's malpractice proximately caused plaintiff's injuries. It is undisputed that plaintiff's aneurysm ruptured and that he suffered amputation of his legs as a result. The jury heard testimony that, had plaintiff been diagnosed earlier and undergone elective surgery, his chance of having complete success with no complications would have been approximately 95 percent, his chance of death would have been 1 to 5 percent, and his chance of amputation would have been 1 percent. Given the rupture, his approximate chance of complete success with no complications dropped to 5 to 10 percent, his chance of death became 60 to 90 percent, and his chance of surviving, but suffering amputation, became 5 percent. When a patient's chance of complete success drops from 95 percent to less than 10 percent because of a doctor's malpractice, and the patient suffers one of the natural complications, the jury's conclusion that the malpractice proximately caused that injury is warranted. If the jury in this case could only have considered the specific risk of amputation, as Justice MARKMAN suggests, *post* at 216 n 25, plaintiff would essentially be penalized for managing to survive an event that few others do. While the risks associated with harms that were not actually suffered by a plaintiff are not relevant to the extent of a plaintiff's lost opportunity, potential risks stemming from a physician's malpractice may be relevant to the jury's determination of whether malpractice caused a plaintiff to suffer a particular harm rather than achieve a good result.

tation of the second sentence can be discerned by an examination of the text of the statute. The result of this analysis is confirmed by the history of both the loss-of-opportunity doctrine and the statute. There is no internal conflict within the statute. The loss-of-opportunity doctrine is entirely consistent with the more-probable-than-not causation standard, so there is no conflict between the first and second sentences of MCL 600.2912a(2).

RESPONSE TO JUSTICE MARKMAN

Justice MARKMAN's approach to interpreting MCL 600.2912a(2) is grounded in several faulty premises. The first is that traditional medical-malpractice cases require that there be "no question that the proper treatment would have resulted in a good outcome," because otherwise "it cannot be proved that the improper treatment caused the bad outcome." *Post* at 217. This proposition would preclude plaintiffs with preexisting conditions that might have contributed *slightly* to their injuries from bringing medical-malpractice claims. It would also preclude medical-malpractice claims from arising in situations in which proper medical treatment does not *always* succeed.[8] This proposition cannot be

[8] Justice MARKMAN cites no authority for the proposition that a plaintiff may only recover for traditional medical malpractice if proper treatment would not have resulted in the bad result suffered by the plaintiff. If true, that principle would foreclose virtually all traditional medical-malpractice cases. With almost any medical procedure, there is a statistical probability that a patient will experience a bad result, even if the procedure is performed properly. As just one example, the Food and Drug Administration (FDA) counsels patients considering LASIK eye surgery that while "[m]ost patients are very pleased with the results of their refractive surgery[,] . . . like any other medical procedure, there are risks involved." Food and Drug Administration, Center for Devices and Radiological Health <http://www.fda.gov/cdrh/LASIK/risks.htm> (accessed July 2, 2008). The FDA advises that the risks of LASIK surgery include

correct. Plaintiffs alleging medical malpractice, regardless of whether they have preexisting conditions, are not required to prove that a defendant was a 100 percent cause of their injuries; they must simply prove more-probable-than-not causation. After all, traditional medical-malpractice claims are subject to the same principles of causation as other negligence claims. As Prosser & Keeton, Torts (5th ed), § 41, p 270, notes, "[w]hen a child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved the child; but the experience of the community permits the conclusion that the absence of the guard played a significant part in the drowning." There is no reason to treat medical-malpractice claims any differently in this regard. For example, even if an expert testified that a properly performed medical procedure will avoid a bad result 99 percent of the time, a jury could still conclude that the physician's negligence was more probably than not the cause of the bad result. See *post* at 217.

Second, Justice MARKMAN's approach suggests that the factor distinguishing a medical-malpractice claim from a lost-opportunity claim is whether there is another possible cause of an injury, such as a preexisting condition. He states:

> . . . I conclude that a "lost opportunity" case is one in which it is at least possible that the bad outcome would have occurred even if the patient had received proper treatment. By contrast, if there is no question that the

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loss of vision, debilitating visual symptoms, and severe dry eye syndrome. *Id*. In sum, "[t]here are **never any guarantees** in medicine." *Id*. Within the realm of eye surgery alone, Justice MARKMAN's rule would mean that any LASIK patient who experienced a loss of vision, debilitating visual symptoms, or severe dry eye syndrome would not be able to bring a traditional medical-malpractice claim simply because there was a chance, however slight, that those conditions would have occurred as a result of the properly performed LASIK procedure itself.

> proper treatment would have resulted in a good outcome, then the patient who suffered a bad outcome has a traditional medical-malpractice action. [*Post* at 186.]

But this definition of a lost-opportunity case is contrary to both the doctrine as described by *Falcon* and the doctrine as adopted by the Legislature in MCL 600.2912a(2). The distinction between a lost-opportunity case and a medical-malpractice case does not pivot on a plaintiff's preexisting condition or the absolute certainty that proper medical treatment would have prevented the harm the plaintiff suffered. Rather, the determining factor is whether the plaintiff can prove, more probably than not, that the defendant's negligence caused physical harm. If a plaintiff can prove more-probable-than-not causation for physical harm, then he has a medical-malpractice claim for that injury. If not, he may have a claim for loss of opportunity to avoid harm, if he can prove that the defendant's negligence caused that injury: the loss of an opportunity to avoid harm. Of course, many lost-opportunity cases arise when a plaintiff has a preexisting condition that could have caused physical harm without negligence, but this is a correlation, not a cause. The fact that a plaintiff has a preexisting condition does not, by itself, cause a claim to be a lost-opportunity claim rather than a medical-malpractice claim. Similarly, the existence of other possible causes for a bad result does not determine the cause of action available to that plaintiff. Specifically, the possibility that a patient's disease or injury itself may have caused the bad result does not mean that the patient cannot bring a traditional medical-malpractice claim.[9] Rather, as *Falcon* ex-

[9] Justice MARKMAN offers the hypothetical treatment of a broken leg to show that his theory of traditional medical-malpractice claims is consistent with traditional causation principles. But he indicates just the

plained, traditional medical-malpractice claims require a plaintiff to show that the negligence more probably than not caused physical harm. *Falcon*, 436 Mich at 449. The Legislature adopted *Falcon*'s term "loss of opportunity" as well as the traditional more-probable-than-not standard of causation. Accordingly, there is no reason to conclude that the distinguishing feature between medical-malpractice claims and lost-opportunity claims is the existence of other possible causes of the harm, as Justice MARKMAN appears to posit.

These faulty suppositions are significant, because they lead Justice MARKMAN to endorse Dr. Roy Waddell's formula for calculating loss of opportunity. Waddell's formula purports to calculate a plaintiff's lost opportunity to survive by determining "what percent of patients who would die without treatment" could otherwise "be saved with treatment."[10] If proper treatment creates a greater than 50 percent chance of survival within the set of patients who would have died without treatment, then a cause of action exists. But Waddell's formula is flawed for several reasons. It operates from a mistaken understanding of a lost-opportunity case. The formula identifies plaintiffs who can show that negligence was more than a 50 percent cause of their death or physical harm. But that set of plaintiffs can, by definition, maintain a traditional cause of action for medical malpractice for the injury of death or physical harm itself. Accordingly, his formula would preclude true lost-opportunity plaintiffs from bringing claims

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opposite, by precluding a medical-malpractice claim unless administering proper treatment would never produce permanent damage. Assuming that a patient was treated, this requirement eliminates the possibility that another force (such as the natural progression of the broken leg itself), rather than negligence, caused the permanent damage to the leg.

[10] Waddell, *A doctor's view of "opportunity to survive"*: Fulton's *assumptions and math are wrong*, 86 Mich B J 32, 33 (March 2007).

and provide medical-malpractice claimants with lost-opportunity causes of action for which they have no need. Moreover, aside from its theoretical problems, the Waddell formula is blatantly inconsistent with the language of MCL 600.2912a(2).[11] It is inconceivable that Justice MARKMAN can read the sentence "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%" and conclude that it should be translated into this formula:

$$\frac{\text{(Premalpractice chance)} - \text{(Postmalpractice chance)}}{100 - \text{(Postmalpractice chance)}} \times 100$$

This formula has no basis in the language of MCL 600.2912a(2) or *Falcon*. MCL 600.2912a(2) simply requires that the opportunity was greater than 50 percent. Again, it is noteworthy that my interpretation does not require adding any inferred language to the statute. A plaintiff's premalpractice opportunity to survive or to achieve a better result must simply have been "greater than 50%." The approach taken by Justice MARKMAN and Dr. Waddell requires this sentence to be rewritten to state

[11] Justice MARKMAN opines that in the matter of MCL 600.2912a(2), "there is quite likely some disconnection between what the Legislature may have had in mind and what it actually enacted." *Post* at 198 n 15. Yet, despite appearing to believe that the Legislature's intent may not correlate to the words of MCL 600.2912a(2), Justice MARKMAN is nevertheless convinced that he can discern the Legislature's intent from the statutory language. Further, he argues that the Waddell formula is consistent with the statutory language, even while conceding that the Legislature may not have had the concept that was later embodied in Waddell's formula specifically in mind when it enacted MCL 600.2912a(2). I think it is more than merely possible that the Legislature did not have this concept in mind when it crafted this law; notably, Waddell's article was not even published until 2007, long after the Legislature amended MCL 600.2912a(2) in 1993.

that the plaintiff's opportunity to survive or to achieve a better result must have been decreased by 50 percent. See *post* at 195-197.

Finally, the Waddell approach leads to such anomalous results that it cannot possibly reflect the intention of the Legislature. The Legislature crafted MCL 600.2912a(2) as a reaction to *Falcon*, which permitted a lost-opportunity cause of action when the plaintiff's premalpractice opportunity to survive was 37.5 percent. As Justice MARKMAN acknowledges, if a plaintiff dropped from a 99.99 percent premalpractice chance of survival to a 99.97 percent postmalpractice chance of survival, the Waddell formula would conclude that the plaintiff had experienced an actionable 66.67 percent loss of opportunity. On the other hand, recovery would be barred if a plaintiff dropped from a 60 percent premalpractice chance of survival to a 40 percent chance of survival, because the plaintiff would have experienced only a 33 percent loss of opportunity. It is unlikely that the Legislature intended to compensate a loss of just 0.02 percentage points, while simultaneously precluding a loss of 20 percentage points. It is more likely that the Legislature disagreed with the threshold limit for lost-opportunity cases established by *Falcon*, 37.5 percent, and amended MCL 600.2912a(2) to raise the threshold to 50 percent.

RESPONSE TO CHIEF JUSTICE TAYLOR

While we reach different interpretations of MCL 600.2912a(2), I nevertheless agree with Justice MARKMAN that Chief Justice TAYLOR errs by concluding that the second sentence of the statute is incomprehensible and unenforceable. I share Justice MARKMAN's objection to the unprecedented approach Chief Justice TAYLOR has taken in concluding that this statute is unenforceable simply

because it presents a complex matter of interpretation. While the fracture of this Court on this matter certainly illustrates the difficulty of interpreting this statute, I disagree that it compels the conclusion that the statute is unenforceable. And, in fact, Chief Justice TAYLOR's opinion paradoxically indicates that the statute will continue to be enforced unless the Legislature amends it, because the *Fulton* panel's interpretation will remain controlling law. *Ante* at 164 n 14.

CONCLUSION

I disagree with Chief Justice TAYLOR's conclusion that the second sentence of MCL 600.2912a(2) is incomprehensible and cannot be judicially enforced. Therefore, I respectfully disagree with his analysis of that provision. However, I agree that the jury's verdict should be upheld, because plaintiff has presented evidence that supports a traditional medical-malpractice claim.

WEAVER and KELLY, JJ., concurred with CAVANAGH, J.

MARKMAN, J. (*concurring in the result only*). We granted leave to appeal to address the proper interpretation of the second sentence of MCL 600.2912a(2), which states: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." Chief Justice TAYLOR's opinion concludes that this sentence is "substantially incomprehensible," and, therefore, "unenforceable." *Ante* at 147, 161, 164. Although this statutory language is by no means a model of clarity, I am in accord with Justice CAVANAGH's opinion that the "lost opportunity" provision is enforceable.

However, Justice CAVANAGH concludes that the "lost opportunity" provision requires only that the patient's premalpractice chance to survive or obtain a better result be greater than 50 percent. Finally, he concludes that this is not even a "lost opportunity" case. In these respects, I also disagree with his opinion.

Instead, I conclude that a "lost opportunity" case is one in which it is at least possible that the bad outcome would have occurred even if the patient had received proper treatment. By contrast, if there is no question that the proper treatment would have resulted in a good outcome, then the patient who has suffered a bad outcome has a traditional medical-malpractice action. In order for a traditional medical-malpractice plaintiff to prevail, he or she must prove that the bad outcome was more probably than not caused by the defendant's malpractice. In order for a "lost opportunity" plaintiff to prevail, he or she must prove that the "lost opportunity" to achieve a better result was more probably than not caused by the defendant's malpractice and that the "lost opportunity" was greater than 50 percent. In order to determine whether the "lost opportunity" was greater than 50 percent, the postmalpractice chance of obtaining a better result must be subtracted from the premalpractice chance, the postmalpractice chance must then be subtracted from 100, the former number must be divided by the latter number, and then this quotient must be multiplied by 100 to obtain a percentage. If this percentage is greater than 50, the plaintiff may be able to prevail; if this percentage is 50 or less, then the plaintiff cannot prevail.

Because it is possible that the bad outcome in the instant case, i.e., amputation, would have occurred even if plaintiff had received proper treatment, given that there was some chance of amputation in the latter circum-

stance, this is a "lost opportunity" action. Because plaintiff's "lost opportunity" was greater than 50 percent,[1] I would affirm the result reached by the Court of Appeals.

I. "LOST OPPORTUNITY"

A. COMMON LAW

This Court first recognized a "lost opportunity" claim in *Falcon v Mem Hosp,* 436 Mich 443; 462 NW2d 44 (1990). In *Falcon,* the plaintiff's expert witness testified that had the defendant physician not been negligent, the plaintiff's decedent would have had a 37.5 percent chance of surviving. Before *Falcon,* plaintiffs claiming medical malpractice were required to prove that the malpractice in fact caused the patient's physical harm. *Falcon,* 436 Mich at 448-449 (LEVIN, J.). Thus, in a wrongful-death case grounded in medical malpractice, the plaintiff was required to prove that the malpractice in fact caused the patient's death. In *Falcon,* the defendants argued that because the patient's premalpractice chance of survival was only 37.5 percent, the plaintiff could not prove that the malpractice caused the patient's death; the patient might very well have died even with proper treatment.

Although this Court agreed with the defendants that the plaintiff could not prove that the malpractice caused the patient's death, it nonetheless held that the plaintiff could prove that the malpractice caused the patient to suffer the loss of a 37.5 percent opportunity to survive. *Id.* at 460. "In reducing [the patient's] opportunity of living . . . , her physician caused her harm, although it cannot be said . . . that he caused her death." *Id.* "We

[1] $\frac{99 - 95}{100 - 95} \times 100 = 80\%$

thus see the injury resulting from medical malpractice as not only, or necessarily, physical harm, but also as including the loss of opportunity of avoiding physical harm" because a "patient goes to a physician precisely to improve his opportunities of avoiding, ameliorating, or reducing physical harm . . . ." *Id.* at 461. Thus, we recognized a "loss of an opportunity for a more favorable result, as distinguished from the unfavorable result [itself], as compensable in medical malpractice actions." *Id.*[2] "Under this approach, damages are recoverable for the loss of opportunity although the opportunity lost was less than even, and thus it is not more probable than not that the unfavorable result would or could have been avoided." *Id.* at 461-462.[3]

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[2] Justice ARCHER signed the lead opinion written by Justice LEVIN, and Justice BOYLE wrote a concurring opinion, which Justice CAVANAGH joined, that stated:

> I concur in the recognition of "lost opportunity to survive" as injury for which tort law should allow recovery in proportion to the extent of the lost chance of survival, *ante*, [436 Mich at] 466, provided that the negligence of the defendant more probably than not caused the loss of opportunity. However, I would emphasize that the Court today is called upon to decide the viability of a claim for "lost opportunity" only where the ultimate harm to the victim is death. Thus, any language in the lead opinion suggesting that a similar cause of action might lie for a lost opportunity of avoiding lesser physical harm is dicta. [*Falcon,* 436 Mich at 472-473 (BOYLE, J., concurring).]

[3] "[C]onsider the case in which a doctor negligently fails to diagnose a patient's cancerous condition until it has become inoperable. Assume further that even with a timely diagnosis the patient would have had only a 30% chance of recovering from the disease and surviving over the long term. There are two ways of handling such a case. Under the traditional approach, this loss of a not-better-than-even chance of recovering from the cancer would not be compensable because it did not appear more likely [than] not that the patient would have survived with proper care. . . . A more rational approach, however, would allow recovery for the loss of the chance of cure even though the chance was not better than

However, even "[u]nder this approach, the plaintiff must establish more-probable-than-not causation." *Id.* at 462. That is, the plaintiff "must prove, more probably than not, that the defendant reduced the opportunity of avoiding harm." *Id.* Therefore, in both a traditional medical-malpractice action, in which the alleged injury is the physical injury itself, and a "lost opportunity" action, in which the alleged injury is the "lost opportunity" to achieve a better result, the plaintiff must prove that it is more probable than not that the defendant's malpractice caused the injury. In other words, the difference between these two causes of action is not the standard of proof for causation, but the nature of the alleged injury.

This Court also held that the "lost opportunity" must be a "substantial" lost opportunity. *Id.* at 470. However, this Court did not define the parameters of a "substantial" lost opportunity other than to say that the "loss of a 37.5 percent opportunity of living constitutes a loss of a substantial opportunity of avoiding physical harm." *Id.*[4] This Court explained that a "37.5 percent opportunity of living is hardly the kind of opportunity that any of us would willingly allow our health care providers to ignore." *Id.* at 460.[5]

> even. . . . While the plaintiff here could not prove by a preponderance of the evidence that he was denied a cure by the defendant's negligence, he could show by a preponderance that he was deprived of a 30% chance of a cure." [*Falcon,* 436 Mich at 462 n 26, quoting King, *Causation, valuation, and chance in personal injury torts involving preexisting conditions and future consequences,* 90 Yale L J 1353, 1363-1364 (1981).]

[4] This Court expressly stated: "We need not now decide what lesser percentage would constitute a substantial loss of opportunity." *Falcon,* 436 Mich at 470 (LEVIN, J.).

[5] In *Falcon,* the patient's premalpractice chance of survival was 37.5 percent. The Court did not indicate what the patient's postmalpractice

Finally, this Court held that "recovery should be allowed '*only* for the lost chance of survival.' " *Id.* at 471 (citation omitted) (emphasis in original). That is, the " 'proper computation of damages would limit the damages recoverable to only that amount of reduced chance of recovery actually caused by the physician's negligent conduct.' " *Id.* at 472 n 47 (citation omitted). Therefore, we concluded that if the jury were to find that the physician's malpractice more probably than not had caused the patient to lose a 37.5 percent opportunity to survive, "37.5 percent times the damages recoverable for wrongful death would be an appropriate measure of damages." *Id.* at 471.[6]

In *Weymers v Khera*, 454 Mich 639, 642; 563 NW2d 647 (1997), this Court refused to "recognize a cause of action for the loss of an opportunity to avoid physical

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chance of survival was. It appears that the Court may simply have assumed, erroneously, that the patient's postmalpractice chance of survival was zero percent, given that the patient died. However, because somebody dies does not mean that the person had a zero percent chance of survival.

[6] As Professor King has explained:

> A better method of valuation would measure a compensable chance as the percentage probability by which the defendant's tortious conduct diminished the likelihood of achieving some more favorable outcome. . . .
>
> To illustrate, consider a patient who suffers a heart attack and dies as a result. Assume that the defendant-physician negligently misdiagnosed the patient's condition, but that the patient would have had only a 40% chance of survival even with a timely diagnosis and proper care. Regardless of whether it could be said that the defendant caused the decedent's death, he caused the loss of a chance, and that chance-interest should be completely redressed in its own right. Under the proposed rule, the plaintiff's compensation for the loss of the victim's chance of surviving the heart attack would be 40% of the compensable value of the victim's life had he survived . . . . [King, 90 Yale L J at 1382.]

harm less than death."[7] Although *Weymers* did not overrule *Falcon,* it clearly disagreed with *Falcon*[8] and "refuse[d] to extend *Falcon.*" *Id.* at 649. In *Weymers,* the plaintiff's expert testified that "if defendants had given plaintiff proper care she would have had a thirty to forty percent chance of retaining the functioning of her kidneys." *Id.* at 644. However, the plaintiff did not receive proper care and her kidneys totally failed, requiring her to undergo a kidney transplant. Because the plaintiff's premalpractice chance to avoid kidney failure was not greater than 50 percent, *Weymers* held that she could not prove that the malpractice more probably than not caused her kidney failure. The Court refused to recognize a cause of action for the plaintiff's "lost opportunity" to avoid kidney failure.

In doing so, *Weymers*, in my judgment, mischaracterized the "lost opportunity" doctrine that had been developed in *Falcon*. *Weymers* stated: "The antithesis of proximate cause is the doctrine of lost opportunity," because the "lost opportunity doctrine allows a plaintiff to recover when the defendant's negligence possibly, i.e., a probability of fifty percent or less, caused the plaintiff's injury." *Id.* at 648. *Weymers* also accused the

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[7] Although *Weymers* was decided after the Legislature enacted the statutory provision at issue in this case, the Court applied the common law rather than the statute because the alleged negligence occurred before the statute was enacted. It is also worth mentioning that *Weymers* refused to recognize a common-law claim for a "lost opportunity" to avoid physical harm less than death, although the statute expressly allows those claims. Finally, *Weymers* stated that "[o]ur Legislature immediately rejected *Falcon* and the lost opportunity doctrine." *Weymers,* 454 Mich at 649. For the reasons discussed later, I do not believe that this is entirely accurate.

[8] That *Weymers* disagreed with *Falcon* explains why Justice BOYLE, who concurred in *Falcon,* only concurred in the result reached in *Weymers* and why Justice CAVANAGH, who joined Justice BOYLE's concurrence in *Falcon,* dissented in *Weymers*. It is also interesting to note that the dissenting justice in *Falcon* was the authoring justice in *Weymers*.

Falcon Court of "lower[ing] the standard of causation" and "allow[ing] [a plaintiff] to recover without establishing cause in fact." *Id.* at 650. Finally, *Weymers* stated that under the *Falcon* approach, "the plaintiff must show that there is a substantial possibility that the defendant's negligence caused his injury," and, thus, a plaintiff is allowed "to recover for his injury even though it was more likely than not that he would have suffered the injury if the defendant had not been negligent." *Id.* at 651.

Although *Weymers* noted that *Falcon* had "defined the injury as the loss of opportunity to avoid the harm, i.e., the death, rather than the harm itself," *Weymers* failed to recognize the significance of this distinction, as shown by its very next sentence, which stated that *Falcon*'s approach allows " 'a plaintiff [to] receive[] compensation despite the greater probability that he or she would have suffered the injury even if the physician had used due care.' " *Id.* at 651 n 19 (citation omitted). This is further shown by the fact that the *Weymers* majority believed that it would have to "scrap[]" or "discard" causation in order to "recognize a cause of action for the loss of an opportunity to avoid physical harm less than death." *Id.* at 653.

However, as discussed earlier, *Falcon* did not lower the standard of causation when it adopted the "lost opportunity" doctrine. *Falcon,* 436 Mich at 462 (LEVIN, J.). Instead, it applied the same standard of causation, i.e., more probable than not, to a new type of injury, i.e., a "lost opportunity" to survive. *Id. Falcon* specifically held that a plaintiff bringing a "lost opportunity" claim "must prove, more probably than not, that the defendant reduced the opportunity of avoiding harm." *Id.*

Therefore, *Weymers* erred when it described the "lost opportunity" doctrine developed in *Falcon* as lowering the standard of causation.

B. STATUTORY PROVISION

In 1993, three years after *Falcon* was decided, the Legislature enacted MCL 600.2912a(2), which provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

Everybody agrees that this provision was enacted in response to this Court's decision in *Falcon*.

In *Wickens v Oakwood Healthcare Sys,* 465 Mich 53, 62; 631 NW2d 686 (2001), this Court held that "a living plaintiff may not recover for loss of an opportunity to survive on the basis of a decrease in her chances of long-term survival." The plaintiff's expert testified that the defendants' negligent one-year delay in diagnosing her breast cancer had caused plaintiff to suffer a reduction in her chances of surviving another 10 years. This Court relied on the first sentence of MCL 600.2912a(2), which states that a medical-malpractice plaintiff "has the burden of proving that he or she *suffered an injury* that more probably than not was proximately caused by the negligence of the defendant." (Emphasis added.) We held that this provision "expressly limits recovery to injuries that have already been suffered and more probably than not were caused by the defendant's malpractice." *Wickens,* 465 Mich at 60. "Thus, plaintiff can only recover for a present

injury, not for a potential future injury." *Id.*[9] Because the plaintiff in *Wickens* survived, she had not suffered a loss of an opportunity to survive. *Id.* That is, a person who survives cannot be said to have suffered a loss of an opportunity to survive. A person does not suffer a loss of an opportunity to survive until that person ceases to survive. Although we held that the surviving plaintiff in *Wickens* could not bring a claim for a loss of an opportunity to survive, this Court did hold that the plaintiff's claims that the delayed diagnosis resulted in the "need for more invasive medical treatments, emotional trauma, and pain and suffering" could proceed because she had already suffered those injuries. *Id.* at 61.

In *Fulton v William Beaumont Hosp,* 253 Mich App 70, 77-78; 655 NW2d 569 (2002), the Court of Appeals described the issue as

> whether the second sentence of [MCL 600.2912a(2)] requires a plaintiff in order to recover for loss of an opportunity to survive to show only that the initial opportunity to survive before the alleged malpractice was greater than fifty percent, as argued by plaintiff, or, instead, that the opportunity to survive was reduced by greater than fifty percent because of the alleged malpractice, as argued by defendants.

The Court held that the language "the opportunity" was ambiguous, because it could be referring to the "initial opportunity" or it could be referring to the "loss of opportunity." *Id.* at 80. However, because the Court believed that "MCL 600.2912a(2) was enacted to codify and increase the requirements [set forth in *Falcon*] for

[9] This statutory requirement is consistent with the common law. See, e.g., *Henry v Dow Chem Co*, 473 Mich 63, 75-76; 701 NW2d 684 (2005) (holding that "a plaintiff must demonstrate a present physical injury to person or property" in order to sustain a negligence claim).

what constitutes a 'substantial loss of opportunity,' " *id.* at 82, quoting *Falcon,* 436 Mich at 470, and because *Falcon* "did not focus on the initial opportunity to survive, but focused on whether the decrease in the decedent's opportunity to survive was substantial," *Fulton,* 253 Mich App at 81, the Court chose the latter interpretation, *id.* at 83. That is, the Court held that the "lost opportunity," not just the initial opportunity, must "exceed 50 percent." *Id.*

I agree with this. The second sentence of MCL 600.2912a(2) reads: "In an action alleging medical malpractice, the plaintiff cannot recover for *loss of an opportunity* to survive or an opportunity to achieve a better result unless *the opportunity* was greater than 50%." (Emphasis added.) This sentence first refers to the "loss of an opportunity" and then to "the opportunity." In my judgment, the language "the opportunity" clearly refers back to the "loss of an opportunity." Therefore, the second sentence can reasonably be read to mean that the loss of the opportunity must be greater than 50 percent. In contrast, there is no reasonable means of reading the language "initial opportunity" into the sentence. Therefore, I agree with *Fulton*'s conclusion that the lost opportunity, not just the initial opportunity, must be greater than 50 percent.[10]

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[10] Contrary to Justice CAVANAGH's contention, I do not believe I am reading words into the statute by concluding that MCL 600.2912a(2), which states that the "lost opportunity" must be greater than 50 percent, means that the patient's opportunity to achieve a better result "must have been decreased by 50 percent." *Ante* at 183-184. If an opportunity has been "lost," the opportunity has obviously "decreased." Nor do I "misquot[e]" the statute, as Justice CAVANAGH asserts. *Ante* at 175 n 5. I am cognizant that the statute states: "the plaintiff cannot recover for *loss of an opportunity* to survive or an opportunity to achieve a better result unless *the opportunity* was greater than 50%." MCL 600.2912a(2) (emphasis added). For the reasons already discussed, I believe that the phrase "the opportunity" obviously refers back to "loss of an opportunity." In

The Court of Appeals in *Fulton* next concluded that because the plaintiff's premalpractice chance of survival was 85 percent and her postmalpractice chance of survival was 60 percent to 65 percent, her "lost opportunity" was 20 percent to 25 percent and, thus, because the plaintiff's "lost opportunity" was not greater than 50 percent, she could not recover under MCL 600.2912a(2). However, *Fulton* did not offer any explanation as to why it merely subtracted the postmalpractice chance from the premalpractice chance to determine the "lost opportunity." This might have been the correct method of determining the "lost opportunity" if MCL 600.2912a(2) required that such a loss be "greater than 50 percentage points." However, MCL 600.2912a(2) requires that the "lost opportunity" be "greater than 50%." There is a significant distinction between 50 percentage points and 50 percent. As Dr. Roy Waddell, a board-certified orthopedic surgeon in Grand Rapids, has explained: "A decrease in survival rate from 50 percent to 10 percent is a 40-*percentage-point* decrease, but it is an 80 *percent* decrease." Waddell, *A doctor's view of "opportunity to survive"*: *Fulton's assumptions and math are wrong*, 86 Mich B J 32, 33 (March 2007) (emphasis in original). Similarly, a reduction in wages from $5 an hour to $1 an hour is not a 4 percent reduction in wages; rather, it is an 80 percent reduction in wages. See amicus curiae brief on behalf of Dr. Roy W. Waddell, pp 12-13.[11]

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contrast, I believe that Justice CAVANAGH *is* reading words into the statute by concluding that MCL 600.2912a(2) means that the patient's "initial" chance of obtaining a better result must have been greater than 50 percent when the word "initial" cannot be found anywhere in the statutory provision. That is, while the language "*loss* of an opportunity" can be found in the statute, the language "*initial* opportunity" cannot be found in the statute.

[11] Like the Court of Appeals in *Fulton*, Justice CAVANAGH offers no explanation as to why he repeatedly calculates the "lost opportunity" in

The other problem with *Fulton*'s method of calculating the "lost opportunity" is that it does not differentiate between those patients who would have survived regardless of whether they received proper or improper treatment and those patients who needed the proper treatment in order to survive.[12] Such a differentiation is necessary because only those in the latter group have truly suffered a "lost opportunity" as a result of the improper treatment. That is, if a patient would have survived regardless of whether he received proper or improper treatment, the improper treatment cannot be said to have caused him to lose an opportunity to survive. On the other hand, if the patient would have survived only if he had received the proper treatment, the improper treatment *can* be said to have caused him to lose an opportunity to survive. MCL 600.2912a(2) requires us to determine whether the patient more likely than not fell into the latter category rather than the former category, because the statute only allows a plaintiff to recover for a "loss of an opportunity" that was "greater than 50%" and that was "caused by the negligence of the defendant . . . ." Dr. Waddell's calculation does just that:

$$\frac{(\text{Premalpractice chance})^{13} - (\text{Postmalpractice chance})^{14}}{100 - (\text{Postmalpractice chance})}$$

terms of the percentage points lost rather than the actual percentage lost when MCL 600.2912a(2) clearly states that the "lost opportunity" must be "greater than 50%," not greater than 50 percentage points. These statistical concepts are utterly distinct.

[12] Although I repeatedly refer to a lost "opportunity to survive," I recognize that MCL 600.2912a(2), unlike *Weymers*, 454 Mich at 642, also permits a cause of action for a lost "opportunity to achieve a better result."

[13] "Premalpractice chance" refers to the patient's premalpractice chance of survival or chance to achieve a better result. Waddell, 86 Mich B J at 33, refers to this as the "treated survival rate."

The quotient resulting from this numerator and denominator is then multiplied by 100 to obtain a percentage.[15] This number must be "greater than 50%" in order to satisfy the requirement of the second sentence of MCL 600.2912a(2). For instance, if the patient's pre-

[14] "Postmalpractice chance" refers to the patient's postmalpractice chance of survival or chance to achieve a better result. Waddell, 86 Mich B J at 33, refers to this as the "untreated survival rate."

[15] Dr. Waddell's calculation may not be the only conceivable calculation for making the necessary determination under MCL 600.2912a(2), but, in my judgment, it constitutes a reasonable calculation that is in accord with the language of the statute. Moreover, I am cognizant that the Legislature may not specifically have had in mind the concept later embodied in Dr. Waddell's formula when it enacted MCL 600.2912a(2). However, it is the actual language of a statute to which this Court must ultimately be faithful. *People v Schaefer*, 473 Mich 418, 430; 703 NW2d 774 (2005) ("When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute."). The instant case is one in which there is quite likely some disconnection between what the Legislature may have had in mind and what it actually enacted. In the end, though, it is the written law enacted by the Legislature that this Court interprets, not the Legislature's unstated intentions or the presumed thought processes of individual members of the Legislature.

Justice CAVANAGH's amazement that I can "discern the Legislature's intent from the statutory language [of MCL 600.2912a(2)]," *ante* at 183 n 11, is quite remarkable, given that he purports to do exactly the same thing, albeit reaching a different conclusion. Indeed, seeking to discern intent from statutory language is generally what judges do when interpreting the law. He is also determined to make light of the fact that the Legislature could not have had "in mind" when crafting MCL 600.2912a(2) "the concept that was later embodied in Waddell's formula . . . ." *Ante* at 183 n 11. Although I recognize that the Legislature may not "specifically [have had] in mind" the concept underlying Dr. Waddell's formula, in essentially comparing premalpractice and postmalpractice opportunities in terms of percentages rather than percentage points, this formula is an altogether logical and commonsensical way of looking at "loss of opportunity" claims. Nonetheless, the only conclusion I reach in this opinion is that, whatever was in the recesses of Senator A's or Representative B's minds in the Legislature, they and their colleagues crafted a statute that is consistent with Dr. Waddell's formula and inconsistent with Justice CAVANAGH's interpretation.

malpractice chance to achieve a better result was 80 percent and, as a result of the defendant's malpractice, the patient's postmalpractice chance is reduced to 20 percent, the patient has suffered a 75 percent loss of an opportunity to survive.[16]

What the Waddell formula essentially does is test the sufficiency of the expert testimony, which is typically presented in the form of two statistics: the likelihood that a patient would have had a good outcome with proper treatment (the "treated survival rate") and the likelihood that a patient would have had a good outcome with negligent treatment (the "untreated survival rate"). The Waddell formula allows a court analyzing this data to determine whether the plaintiff, when the patient has experienced a bad outcome, has created a question of material fact concerning whether proper treatment more likely than not would have made a difference. The formula does this by identifying the universe of patients who would have had a bad outcome (the denominator) and the subset of those patients who could have been favorably treated (the numerator).

It is easiest to start with the formula's denominator. This denominator consists of the universe of all patients who would have had a bad outcome, for whatever reason. This group includes two subsets of patients: those who would have had a bad outcome because they received negligent treatment, and those who would have had a bad outcome despite receiving proper treatment. The formula identifies this group by subtracting from 100 the percentage of patients who would have had a good outcome even without proper treatment; in other words, it subtracts the "untreated survival rate"

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[16] $\frac{80 - 20}{100 - 20} \times 100 = 75\%$

from 100. In this way, a court can take the expert's statistics and identify those patients who were not treated properly and who experienced a bad outcome. A patient who is the subject of a medical-malpractice action is a member of this group. But we cannot determine whether the patient is a member of this group because he or she was denied the proper treatment or because he or she would have suffered a bad outcome even with proper treatment.

One more calculation must then be made in order to answer the dispositive question posed by the statute: whether it is more likely than not that the patient would have benefited from proper treatment or, put another way, whether the "opportunity to survive or . . . to achieve a better result" was "greater than 50%." MCL 600.2912a(2). A court has to determine what percentage of those patients with a bad outcome (those patients in the denominator) would have benefited from treatment. This brings us to the Waddell formula's numerator. The numerator consists of those patients who would have had a bad outcome only if they had been negligently treated. It is calculated by subtracting the "untreated survival rate" from the "treated survival rate," thus identifying those patients who required treatment to avoid a bad outcome.

Once the numerator and denominator have been calculated, comparison of these two numbers by their quotient allows a court to reasonably determine whether improper treatment more likely than not made a difference in the patient's outcome. If the number of patients who would have had a bad outcome only if they had been negligently treated (the numerator) comprises more than half of the number of patients who would have had a bad outcome overall (the denominator), then the plaintiff has established that proper treatment

more likely than not would have made a difference. In other words, when this has been shown, the plaintiff has created a question of material fact concerning whether the "opportunity"— the benefit that would have been realized by a group of patients from the treatment that was not given to this specific patient—was greater than 50 percent. Such a plaintiff has presented adequate expert testimony to establish a "lost opportunity" cause of action within the meaning of the statute.

As Dr. Waddell has explained:

> [T]he intent of the law is to disallow damages unless it can be shown that *proper treatment creates a better than even* ("greater than 50%") *chance of survival of the patients who would have died without treatment*. In other words, if appropriate treatment *cannot* save at least half of the patients who otherwise would have died, then you do not have sufficient evidence to show that the negligence made the difference in the adverse outcome (death). Conversely, if good treatment *can* save more than half of the patients who otherwise would have died, then you have adequate evidence that the poor treatment or negligence was likely to blame for the bad outcome. This is exactly what this definition of opportunity measures. [Waddell, 86 Mich B J at 33 (emphasis in original).]

MCL 600.2912a(2) only allows a plaintiff to recover for a "loss of an opportunity" that was "greater than 50%" and that was "caused by the negligence of the defendant . . . ." Use of Dr. Waddell's formula, which generates the actual percentage lost rather than the number of percentage points lost, and excludes those who would have achieved a good result regardless of the malpractice, best ensures, in my judgment, that these statutory requirements are satisfied. That is, this calculation would impose liability, in accordance with MCL 600.2912a(2), in those instances in which the medical

care received more likely than not affected whether the patient survived.[17]

II. APPLICATION

Plaintiff's premalpractice chance to obtain a better result was 99 percent, and his postmalpractice chance of obtaining a better result was 95 percent. Pursuant to the Waddell calculation, plaintiff lost an 80 percent opportunity to achieve a better result:

$$\frac{99 - 95}{100 - 95} \times 100 = 80\%$$

Therefore, plaintiff's "lost opportunity" was "greater than 50%." Accordingly, plaintiff satisfied the requirements of MCL 600.2912(a)(2). Therefore, I would affirm the result of the Court of Appeals judgment.[18]

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[17] I acknowledge that the Waddell approach appears to lead to anomalous results in those situations in which there is only a slight loss of an opportunity. For example, as defendants point out, if the premalpractice chance of survival was 99.99 percent and the postmalpractice chance was 99.97 percent, the "lost opportunity" would be 66.67 percent. Possibly, this would not constitute a practical problem, because experts are not generally able to predict opportunities with this degree of precision. See, e.g., *Falcon,* 436 Mich at 449 n 5 (LEVIN, J.) (" 'Human nature being what it is, and the difference between scientific and legal tests for "probability" often creating confusion, for every expert witness who evaluates the lost chance at 49% there is another who estimates it at closer to 51%.' ") (citation omitted). Nonetheless, if the Legislature wants to avoid the possibility of such an anomalous result, it could require, for example, that there be a threshold *percentage-point* loss as a result of the defendant's malpractice, say 5 or 10 percentage points, in addition to the requirement of the loss being "greater than 50%." Finally, I would emphasize that I am neither advocating for nor against the Waddell calculation as a matter of fairness or sound public policy; I simply believe that it is in accordance with the Legislature's directions in MCL 600.2912a(2).

[18] Although, for the reasons discussed above, I agree with the result reached by the Court of Appeals, I respectfully disagree with its calculation of the "lost opportunity." In addition, I disagree with its conclusion

III. RESPONSE TO CHIEF JUSTICE TAYLOR

Chief Justice TAYLOR's opinion concludes that the second sentence of MCL 600.2912a(2) is "substantially incomprehensible," and, therefore, "unenforceable." *Ante* at 147, 161, 164.[19] Although he does not expressly rely on the "void for vagueness" doctrine, he is apparently doing just that, because I am unaware of any other doctrine that would allow a court to conclude that a statutory provision is "unenforceable" on the basis that it is "substantially incomprehensible." The enactments of the Legislature are, as a rule, enforceable in the courts of this state absent a violation of the Michigan or the United States constitutions.

The "void for vagueness" doctrine derives from the Due Process Clause. " 'It is a basic principle of due process that an enactment is void for vagueness if its

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that *all* the risks to which the patient was exposed should be considered when determining the patient's "lost opportunity." Instead, I believe that *only* those risks associated with the injuries that the patient actually suffered should be considered, since the whole point of a negligence action is to establish that the defendant's negligence caused a specific injury. That the negligence could possibly have caused *other* injuries is just not relevant. Further, only considering the risks associated with the injuries actually suffered is consistent with our decision in *Wickens*, 465 Mich at 54, 61, in which we held that "a living person may not recover for loss of an opportunity to survive," because "a loss of opportunity to survive claim only encompasses injuries already suffered . . . ." Therefore, the risk of death cannot be considered when the plaintiff did not actually die.

Moreover, as discussed above, plaintiff's recovery should have been limited to 80 percent of the damages calculated, given that plaintiff suffered the loss of an 80 percent opportunity, not a 100 percent opportunity. However, given that it does not appear that defendants ever raised this issue, I would not remand to the trial court on this basis.

[19] In similar fashion, his opinion states that MCL 600.2912a(2) "cannot be interpreted as written," that it "create[s] a paradox," and that the second sentence of the statute "impossibly conflicts" with the first sentence. *Ante* at 157, 158, 160-161.

prohibitions are not clearly defined.' " *People v Howell,* 396 Mich 16, 20 n 4; 238 NW2d 148 (1976), quoting *Grayned v City of Rockford,* 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). "The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process of law.' " *Roberts v United States Jaycees,* 468 US 609, 629; 104 S Ct 3244; 82 L Ed 2d 462 (1984), quoting *Connally v Gen Constr Co*, 269 US 385, 391; 46 S Ct 126; 70 L Ed 2d 322 (1926). However,

> "this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for '[in] most English words and phrases there lurk uncertainties.' Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." [*People v Petrella,* 424 Mich 221, 255; 380 NW2d 11 (1985) (citations omitted).]

The "void for vagueness" doctrine serves three related interests:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective

> basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' " [*Howell,* 396 Mich at 20 n 4, quoting *Grayned,* 408 US at 108-109.]

I would add that the "void for vagueness" doctrine also ensures that the "judicial power" of this state, see Const 1963, art 6, § 1, is not inappropriately exercised by "interpreting" a statute whose language is simply not susceptible to reasonable interpretation; an attempt to give meaning to such a statute will inevitably devolve into a legislative or policy-making determination on the part of a branch of government whose responsibilities do not entail such determinations.

The "void for vagueness" doctrine has generally been held applicable only to criminal statutes or to laws infringing First Amendment freedoms. Indeed, to the best of my knowledge, this Court has *never* struck down a civil statute that does not implicate First Amendment freedoms under the "void for vagueness" doctrine. Chief Justice TAYLOR's opinion cites no Michigan or federal caselaw to the contrary. Nor can any support for his conclusion be found in any of the parties' briefs or the numerous amicus curiae briefs filed in this Court. Indeed, not one of those briefs even suggests that the "lost opportunity" provision in MCL 600.2912a(2) is unconstitutionally vague.

This Court has held that a

> statute may be challenged for vagueness on the grounds that it
>
> —is overbroad, impinging on First Amendment freedoms, or
>
> —does not provide fair notice of the conduct proscribed, or

> —is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. [*Woll v Attorney General,* 409 Mich 500, 533; 297 NW2d 578 (1980).]

Chief Justice TAYLOR's opinion does not indicate on which of these grounds it finds the "lost opportunity" provision to be unconstitutionally vague. The first ground certainly is not pertinent, because the "lost opportunity" provision does not impinge on any First Amendment freedoms. Neither of the other two grounds seems to be pertinent either, as both seem to pertain to criminal offenses, given that the second ground refers to "the conduct proscribed" and the third ground refers to "whether an offense has been committed." The "lost opportunity" provision neither "proscribe[s]" conduct nor confers "unlimited discretion on the trier of fact to determine whether an offense has been committed." Therefore, there does not seem to be any basis under our current case-law to strike down the "lost opportunity" provision as being unconstitutionally vague. Chief Justice TAYLOR should, at the least, explain and justify his extension of this doctrine, which enables this Court to strike down an enactment of the Legislature.

In *A B Small Co v American Sugar Refining Co,* 267 US 233; 45 S Ct 295; 69 L Ed 589 (1925), the United States Supreme Court held that a buyer could not elude a contract to purchase refined sugar on the basis that the seller was charging an "unjust" or "unreasonable" price in violation of a federal statute, because the federal statute was unconstitutionally vague. It is noteworthy that although *American Sugar* involved a civil breach-of-contract action, the statutory language invalidated was a criminal statute. However, even putting that aside, the Court held that the provision was unconstitutionally vague because it required people to

"conform to a rule or standard which was so vague and indefinite that no one could know what it was." *Id.* at 238-239. That is, it was so "indefinite as to be unintelligible . . . ." *Id.* at 240. In order for something to be "unintelligible," it must be "not capable of being understood." *Random House Webster's College Dictionary* (1991). As discussed throughout this opinion, I simply do not believe that the provision at issue is incapable of being understood. MCL 600.2912a(2) may conceivably be unwise or imprudent, it could conceivably have been drafted with greater clarity and precision, and its interpretation may require an unusual investment of judicial effort, but it is not incapable of being understood.

In *Exxon Corp v Busbee,* 644 F2d 1030, 1031 (CA 5, 1981), the United States Court of Appeals for the Fifth Circuit held that a state commercial regulatory statute was not unconstitutionally vague, because it was not " 'impossible to divine.' " (Citation omitted.) That court explained that "[b]ecause the statute is not concerned with either the first amendment or the definition of criminal conduct, . . . we must be lenient in evaluating its constitutionality." *Id.* at 1033. It further explained that "uncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be *substantially incomprehensible*." *Id.* (emphasis added).[20] Finally, the court indicated that "the parties themselves have offered possible interpretations" of the provision, and then concluded that "[t]hese attempts at statutory construction illustrate that [the provision] is, while most assuredly not a 'model of clarity,' at least amenable to some sensible construction." *Id.* at 1034 (cita-

[20] Although Chief Justice TAYLOR does not expressly state that he believes MCL 600.2912a(2) to be unconstitutionally vague, he uses the identical language—"substantially incomprehensible"—that the *Exxon* Court used when addressing whether a statutory provision was unconstitutionally vague.

tion omitted). Because I conclude that the "lost opportunity" provision at issue in the instant case is likewise "amenable to some sensible construction," I strongly disagree with Chief Justice TAYLOR's conclusion that this provision should be struck down on the grounds of vagueness.

Furthermore, I must emphasize the well-established rule that "this Court will presume that all legislation is constitutional and will attempt to construe legislation so as to preserve its constitutionality[.]" *People v Neumayer,* 405 Mich 341, 362; 275 NW2d 230 (1979).

> No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and it is only when they *manifestly* infringe some provision of the constitution that they can be declared void for that reason. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act. [*Sears v Cottrell*, 5 Mich 251, 259 (1858) (emphasis in original).]

"We are duty bound under the Michigan Constitution to preserve the laws of this state . . . ." *People v Bricker,* 389 Mich 524, 528; 208 NW2d 172 (1973). Therefore, "courts [must] construe the language of a statute so as to give it effect rather than to nullify it." *Petrella,* 424 Mich at 241. "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). "We exercise the power to declare a law unconstitutional with extreme caution . . . ." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). Therefore, "every statute passed by the Legis-

lature is presumed to be constitutional, and a reviewing court should find an act invalid only when there is no reasonable interpretation which will sustain it." *State Treasurer v Wilson*, 423 Mich 138, 146; 377 NW2d 703 (1985). "Indeed, although the presumption is not conclusive, it is powerful enough to permit even a strained construction when necessary to save constitutionality." *Williams v Hofley Mfg Co*, 430 Mich 603, 613; 424 NW2d 278 (1998) (citations omitted); see also *Osborn v Charlevoix Circuit Judge*, 114 Mich 655, 660; 72 NW 982 (1897) ("There is always a presumption in favor of constitutionality, and this presumption justifies a construction which is rather against the natural interpretation of the language used, if necessary to sustain the law.").

"[D]eclaring a statute unconstitutional is ' "the gravest and most delicate duty that this Court is called on to perform" ' . . . ." *People v Lynch,* 410 Mich 343, 352; 301 NW2d 796 (1981) (citation omitted). Although I do not necessarily agree that we are obligated to adopt interpretations that are "strained," *Williams,* 430 Mich at 613, or "against the natural . . . language," *Osborn*, 114 Mich at 660, I do not believe that the interpretation of MCL 600.2912a(2) set forth in this opinion comes anywhere close to such boundaries. I simply do not think that Chief Justice TAYLOR's opinion sufficiently perseveres to avoid the declaration of unconstitutionality that he apparently reaches.[21]

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[21] It is also noteworthy that this Court has repeatedly made it clear that "ambiguity is a finding of last resort," because a finding of ambiguity

> enables an appellate judge to bypass traditional approaches to interpretation and either substitute presumptive " 'rule[s] of policy,' " see *Klapp v United Ins*, 468 Mich 459, 474; 663 NW2d 447 (2003), quoting 5 Corbin, Contracts (rev ed, 1998), § 24.27, p 306, or else to engage in a largely subjective and perambulatory reading

Chief Justice TAYLOR's opinion concludes that MCL 600.2912a(2) is unenforceable because the two sentences in that provision are inconsistent with one another. Once again, I disagree. Chief Justice TAYLOR states that under the first sentence of MCL 600.2912a(2), a plaintiff must prove that the defendant's malpractice caused the injury, while under the second sentence, a plaintiff cannot prove that the defendant's malpractice caused the injury. What he fails to recognize is that in a "lost opportunity" action, the injury is not the death or the physical harm, but the "lost opportunity" to avoid the death or physical harm,[22] and that a "lost opportunity" plaintiff *does* have

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of "legislative history." [*Lansing Mayor v Pub Service Comm,* 470 Mich 154, 164-165 and n 6; 680 NW2d 840 (2004).]

Yet, in this case, Chief Justice TAYLOR not only concludes that the statute is ambiguous, but essentially concludes that it is unconstitutionally vague and, therefore, null and void.

[22] Chief Justice TAYLOR's opinion contends that pursuant to *Wickens,* 465 Mich at 60-61, the injury in a "lost opportunity" action must be the death or the physical harm, not the "lost opportunity" to avoid the death or the physical harm. I disagree. In *Wickens,* this Court simply held that a surviving plaintiff has not lost an opportunity to survive. That is, a surviving plaintiff cannot recover damages for the possibility that he or she may die sometime in the future. There must be a present injury. Therefore, in a "lost opportunity to survive" action, the patient must have failed to survive; and, in a "lost opportunity to achieve a better result" action, the patient must have failed to achieve the better result. Those plaintiffs who survived, and those who achieved the better result, have simply suffered no "lost opportunity" at all, and thus have no grounds on which to seek a recovery. However, those patients who did not survive, and those patients who did not achieve a better result, *do* have a present injury, even though the plaintiffs in those cases cannot prove that the defendant's malpractice caused the death or the physical harm, and these plaintiffs can recover as long as they can prove that the defendant's malpractice caused the patients to lose an opportunity to survive or achieve a better result and that the "lost opportunity" was greater than 50 percent. Contrary to Chief Justice TAYLOR's contention,

to prove that the defendant's malpractice more probably than not caused *this* injury. As we explained in *Falcon,* 436 Mich at 461 (LEVIN, J.): "We thus see the injury resulting from medical malpractice as not only, or necessarily, physical harm, but also as including the loss of opportunity of avoiding physical harm." However, even "[u]nder this approach, the plaintiff must establish more-probable-than-not causation." *Id.* at 462. That is, the plaintiff "must prove, more probably than not, that the defendant reduced the opportunity of avoiding harm." *Id.* Therefore, in both a traditional medical-malpractice action, in which the alleged injury is the death or the physical harm itself, and in a "lost opportunity" action, in which the alleged injury is the "lost opportunity" to avoid the death or the physical harm, the plaintiff must prove that it is more probable than not that the defendant's malpractice caused the injury.

Contrary to Chief Justice TAYLOR's contention, then, the two sentences in MCL 600.2912a(2) are not inconsistent. Pursuant to the first sentence, all medical-malpractice plaintiffs must prove that the defendant's malpractice more probably than not caused the alleged injury. Pursuant to the second sentence, a "lost opportunity" plaintiff must prove that the "lost opportunity" was greater than 50 percent. Therefore, in order to satisfy both sentences, a "lost opportunity" plaintiff must prove that the defendant's malpractice more probably than not caused the "lost opportunity" *and* that the "lost opportunity" was greater than 50 percent. There is nothing inconsistent about these sentences.

Falcon, 436 Mich at 470 (LEVIN, J.), did not allow for the recovery of the same kind of injury that *Wickens* precluded. In *Falcon,* unlike in *Wickens,* the patient did not survive and thus did suffer a "lost opportunity to survive."

However, there *is* something inconsistent about Chief Justice TAYLOR's opinion. He concludes that the second sentence of MCL 600.2912a(2) is so "substantially incomprehensible" that it is "unenforceable." *Ante* at 147, 161, 164. Yet, despite this conclusion, he repeatedly asserts that when the Legislature enacted the second sentence of MCL 600.2912a(2) it "intended" certain things. See, e.g., *ante* at 158, where the he states that the Legislature "intended" the "lost opportunity" provision to apply to "situation[s] in which an injury might have occurred anyway, but in which the defendant's act or omission hastened or worsened it in such a way that the plaintiff suffered more severe physical injury than he or she would have had the negligence not occurred," and *ante* at 162, where he states that "the Legislature intended to retain the traditional proximate-cause requirement in effect before *Falcon* . . . ."[23] If this provision is so vague—indeed of a constitutional dimension, as Chief Justice TAYLOR's opinion essentially concludes—how can he be so certain what the Legislature intended by it? Either we know what the Legislature intended by this provision or we do not; Chief Justice TAYLOR cannot have it both ways.

IV. RESPONSE TO JUSTICE CAVANAGH

In his opinion, Justice CAVANAGH concludes that the second sentence of MCL 600.2912a(2) requires only that the patient's premalpractice chance to obtain a better result be greater than 50 percent. As explained

[23] Chief Justice TAYLOR's opinion contends that the Legislature intended to abolish "lost opportunity" claims. I agree with Justice CAVANAGH's opinion that if that was the Legislature's intent, it would have simply prohibited plaintiffs from bringing "lost opportunity" claims, rather than merely adding a provision that imposes an additional requirement on "lost opportunity" plaintiffs.

earlier, I agree with him that the phrase "the opportunity" in MCL 600.2912a(2) refers back to the language "loss of an opportunity."[24] However, I disagree with his conclusion that "loss of an opportunity" refers to the patient's premalpractice chance to obtain a better result. Instead, I believe that "loss of an opportunity" clearly refers to the opportunity that the patient actually lost as a consequence of the defendant's malpractice. MCL 600.2912a(2) states that "the plaintiff cannot *recover* for loss of an opportunity . . . unless the opportunity was greater than 50%." (Emphasis added.) That is, the opportunity that MCL 600.2912a(2) refers to is the "lost opportunity" for which the plaintiff may "recover." The plaintiff cannot necessarily recover for the entire premalpractice chance to obtain a better result; instead, he or she can only recover for the portion of the premalpractice chance that was actually lost. Justice CAVANAGH's opinion states that "the opportunity alleged to have been lost must be the premalpractice opportunity." *Ante* at 174 (emphasis added). This is plainly incorrect. Instead, the chance alleged to have been lost *may* be the entire premalpractice chance; however, it *may also* be only a portion of the premalpractice chance, as in the instant case in which plaintiff's opportunity to obtain a better result was reduced from 99 percent to 95 percent. Justice CAVANAGH seems to recognize this, because he states that "the premalpractice opportunity . . . is the opportunity that is lost *in some measure* . . . ." *Ante* at 174 (emphasis added). In fact, at one point, he seems to reach the same conclu-

[24] At one point, Justice CAVANAGH asserts that the phrase "the opportunity" refers back to the language "loss of an opportunity" and, thus, that they "are to be construed identically," *ante* at 174; however, at another point, he asserts that my proposed meaning of "the opportunity" would inappropriately read the words "loss of" into the provision, *ante* at 174-175. These assertions are simply incompatible.

sion that I do—"a plaintiff cannot recover for the loss of an opportunity unless *the* opportunity—the premalpractice opportunity that was allegedly lost in some measure—was greater than 50 percent." *Ante* at 174 (emphasis in original). That is, the portion of the premalpractice opportunity that was lost must be greater than 50 percent. However, at other points, he states inconsistently that the word "opportunity" refers only to the premalpractice opportunity. *Ante* at 174.

Justice CAVANAGH's opinion also contends that "MCL 600.2912a(2) cannot limit recovery for the loss of an opportunity to cases in which the loss was greater than 50 percent, because any plaintiff who satisfied that condition would have a traditional medical-malpractice claim for the death or physical harm itself." *Ante* at 175-176. Justice CAVANAGH similarly contends that Dr. Waddell's "formula would preclude true lost-opportunity plaintiffs from bringing claims and provide medical-malpractice claimants with lost-opportunity causes of action for which they have no need." *Ante* at 182-183. These contentions, I believe, are incorrect. For example, in the instant case, although, pursuant to Dr. Waddell's formula, plaintiff suffered the loss of an 80 percent opportunity to achieve a better result, i.e., no amputation, plaintiff cannot prove that defendants' malpractice caused the amputation, as he would be required to do in a traditional medical-malpractice action. He cannot prove that defendants' malpractice caused the amputation because there was at least a 1 percent chance that plaintiff would have suffered an amputation even with proper treatment. However, plaintiff *did* prove that defendants' malpractice caused him to suffer the loss of an 80 percent opportunity to achieve a better result, i.e., no amputation. Therefore, contrary to Justice CAVANAGH's contention, it is possible to have a situation in which the "lost opportunity"

exceeds 50 percent, but the plaintiff cannot satisfy the requirements of a traditional medical-malpractice action, and Dr. Waddell's formula identifies those plaintiffs who cannot satisfy the requirements of a traditional medical-malpractice action but who can satisfy the "lost opportunity" requirements of MCL 600.2912a(2).[25]

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[25] Although Justice CAVANAGH states that he disagrees with my distinction between a "lost opportunity" action and a traditional medical-malpractice action, at other points in his analysis he seems to agree with it. For instance, he states that a plaintiff would not be able to recover for the patient's death in a traditional medical-malpractice action if the patient only had a 40 percent premalpractice chance of survival, because the plaintiff "would not be able to prove that the physician's malpractice more probably than not . . . caused the patient's death" since "[t]here was a 60 percent chance that the patient would have died regardless of the malpractice, as a result of the preexisting condition. But the plaintiff might be able to show that the physician's malpractice more probably than not caused the patient to lose up to a 40 percent chance of avoiding death," i.e., recover for the "lost opportunity" in a "lost opportunity" action. *Ante* at 171-172. This is precisely the distinction that I make between "lost opportunity" actions and traditional medical-malpractice actions.

Yet at other points Justice CAVANAGH seems to misunderstand my distinction between "lost opportunity" actions and traditional medical-malpractice actions. For instance, he states that my distinction must be wrong because we have long held that the medical malpractice does not have to be the sole cause of the injury in order for a medical-malpractice plaintiff to prevail. *Ante* at 176 n 6, 179-182. However, my distinction is not inconsistent with this holding. To the contrary, I agree with Justice CAVANAGH that the medical malpractice does not have to be the sole cause of the injury. For example, if Bill broke Tom's leg and Dr. Jones committed medical malpractice in treating Tom's broken leg, resulting in permanent damage to Tom's leg, Tom may still be able to prevail in a traditional medical-malpractice action for the permanent damage to his leg. He would be able to prevail in such an action if proper treatment would not have resulted in permanent damage. However, if there was a chance that Tom's leg would have been permanently damaged even with proper treatment, then Tom would only be able to recover for his "lost opportunity" of avoiding the permanent damage. Contrary to Justice CAVANAGH's contentions, my analysis would not "preclude plaintiffs with

preexisting conditions that might have contributed *slightly* to their injuries from bringing medical-malpractice claims"; it would not "preclude medical-malpractice claims from arising in situations in which proper medical treatment does not *always* succeed"; and it would not "preclud[e] a medical-malpractice claim unless administering proper treatment would never produce permanent damage." *Ante* at 179, 182 n 9 (emphasis in original). Furthermore, I agree with Justice CAVANAGH that the "fact that a plaintiff has a preexisting condition does not, by itself, cause a claim to be a lost-opportunity claim rather than a [traditional] medical-malpractice claim." *Ante* at 181. As explained above, even though Tom had a pre-existing condition, i.e., a broken leg, Tom would still have a traditional medical-malpractice action if proper treatment would not have resulted in permanent damage.

Finally, Justice CAVANAGH concludes that the instant case is not a "lost opportunity" cause of action. *Ante* at 178. However, this seems to be inconsistent with his *own* definition of a "lost opportunity" cause of action. He defines a "lost opportunity" action as one in which the "lost opportunity" was not greater than 50 percent. *Ante* at 171-172 and n 2, 176-177. He calculates this "lost opportunity" by subtracting the postmalpractice chance of obtaining a better result from the premalpractice chance. *Ante* at 171-172 and n 2, 176-177. In the instant case, the premalpractice chance was 99 percent and the postmalpractice chance was 95 percent. Therefore, pursuant to Justice CAVANAGH's *own* formula, plaintiff's "lost opportunity" was 4 percent. Given that plaintiff's "lost opportunity" was less than 50 percent, I do not understand why he concludes that this is not a "lost opportunity" cause of action. Further, I do not understand why he believes that this plaintiff should prevail, given his conclusion that MCL 600.2912a(2) simply codified *Falcon* and added the requirement that the premalpractice chance must be greater than 50 percent. As Justice CAVANAGH explains, *Falcon* held that the "lost opportunity" must be "substantial." *Ante* at 168, quoting *Falcon,* 436 Mich at 470 n 43 (LEVIN, J.). Does Justice CAVANAGH believe that a 4 percent "lost opportunity" is "substantial"? Justice CAVANAGH, *ante* at 178 n 7, attempts to avoid this dilemma by making the same mistake as the Court of Appeals, i.e., considering *all* potential risks rather than only those risks associated with the injury actually suffered by plaintiff. See n 18 *supra*. For example, given that plaintiff did not die, it is inappropriate to take into consideration, as Justice CAVANAGH does, the fact that plaintiff's *risk* of death increased as a result of the medical malpractice. *Id.* Contrary to Justice CAVANAGH's contention, not considering plaintiff's increased risk of death does not "penalize[] [plaintiff] for managing to survive," *ante* at 178 n 7; it simply does not calculate his entitlement to a recovery in malpractice on the basis of a death that he never suffered. I cannot

In order to satisfy traditional medical-malpractice action requirements, there must be no question that the proper treatment would have resulted in a good outcome (at least with regard to the specific injury suffered by the patient), because if there is any chance that a patient who received proper treatment might nevertheless have suffered the specific bad outcome ultimately suffered by the patient, it cannot be proved that the improper treatment caused the bad outcome. If there is any chance that the proper treatment could have resulted in the bad outcome, the chances of a good outcome with proper treatment and the chances of a good outcome with improper treatment must be compared. That is, under those circumstances, although the plaintiff cannot prove that the defendant's malpractice caused the bad outcome because the bad outcome might have occurred even with proper treatment, the plaintiff may be able to prove that the defendant's malpractice increased the patient's chances of obtaining a bad outcome and, thus, caused him or her to suffer a "lost opportunity" to achieve a better result. This is the only coherent concept of a "lost opportunity" cause of action under MCL 600.2912a(2).[26]

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comprehend why Justice CAVANAGH thinks that considering an increased *risk* of death is "relevant to the jury's determination of whether malpractice [has] caused a plaintiff to suffer a *particular* harm," *ante* at 178 n 7 (emphasis added), when the "particular harm" actually suffered was other than death.

[26] Given that (a) Chief Justice TAYLOR's analysis would render the "lost opportunity" provision null and void, (b) Justice CAVANAGH's analysis is inconsistent and incompatible with the language of the statute, and (c) the analysis in this opinion has no votes other than my own, I urge the Legislature to revisit MCL 600.2912a(2) at its earliest opportunity. If the Legislature wishes to maintain the "lost opportunity" doctrine, it should enact a provision that indicates such an intention, and that sets forth in as clear a manner as possible the requirements a "lost opportunity" plaintiff must satisfy. The fractionalization of this Court in the instant

V. CONCLUSION

A "lost opportunity" action is one in which it is possible that the bad outcome would have occurred even if the patient had received proper treatment. On the other hand, if there is no question that the proper treatment would have resulted in a good outcome and the patient has suffered a bad outcome, the plaintiff possesses a traditional medical-malpractice action. In order for a traditional medical-malpractice plaintiff to prevail, the plaintiff must prove that the bad outcome was more probably than not caused by the defendant's malpractice. In order for a "lost opportunity" plaintiff to prevail, the plaintiff must prove that the "lost opportunity" to achieve a better result was more probably than not caused by the defendant's malpractice and that the "lost opportunity" was greater than 50 percent. In order to determine whether the "lost opportunity" was greater than 50 percent, the postmalpractice chance of obtaining a better result must be subtracted from the premalpractice chance; the postmalpractice chance must then be subtracted from 100; the former number must be divided by the latter number; and then this quotient must be multiplied by 100 to obtain a percentage. The calculation can be summarized as follows:

$$\frac{\text{(Premalpractice chance)} - \text{(Postmalpractice chance)}}{100 - \text{(Postmalpractice chance)}} \times 100$$

case suggests that this has not been achieved by the present language of MCL 600.2912a(2). It is ironic, as Chief Justice TAYLOR points out, *ante* at 164 n 14, that the majority holding in *Fulton* continues apparently to be the law of our state, despite the fact that not a single justice on this Court agrees with this holding and despite the fact that three justices (those supporting Justice CAVANAGH's opinion), who support the *dissent* in *Fulton,* are effectively marshaled in support of this conclusion. Nonetheless, I think that Chief Justice TAYLOR's analysis in this regard is correct.

If this percentage is greater than 50, the plaintiff may be able to prevail; if this percentage is 50 or less, then the plaintiff cannot prevail.

Because it is possible that the bad outcome in this case, i.e., amputation, would have occurred even if plaintiff had received proper treatment, the instant case is a "lost opportunity" action. Because plaintiff's "lost opportunity" was greater than 50 percent, I would affirm the result of the Court of Appeals.

DAIMLERCHRYSLER CORPORATION v STATE TAX COMMISSION
FORD MOTOR COMPANY v STATE TAX COMMISSION
DETROIT DIESEL CORPORATION v STATE TAX COMMISSION

Docket Nos. 133394, 133396, 133400 to 133406. Argued March 4, 2008 (Calendar No. 2). Decided July 30, 2008.

DaimlerChrysler Corporation, Ford Motor Company, and Detroit Diesel Corporation separately sought tax-exemption certificates under MCL 324.5901 *et seq*. of the Natural Resources and Environmental Protection Act (NREPA) for equipment known as "test cells" that the companies use to determine whether the vehicles and engines they sell comply with federal emissions standards. In addition, Detroit Diesel sought a tax-exemption certificate for a diesel engine assembly line known as the Equinox Line facility. The Department of Environmental Quality (DEQ) denied certificates for all the equipment, and the State Tax Commission (STC) affirmed the denials. The companies petitioned various circuit courts for review of the STC's decisions. The Wayne Circuit Court, Michael J. Callahan, J., reversed with regard to Ford's equipment, and the STC, the DEQ, and intervening respondent the city of Dearborn separately appealed. The Wayne Circuit Court, Isidore B. Torres, J., affirmed with regard to Detroit Diesel's equipment, and Detroit Diesel appealed. The Washtenaw Circuit Court, Timothy P. Connors, J., and the Oakland Circuit Court, Michael D. Warren, Jr., J., also affirmed with regard to DaimlerChrysler's equipment, and DaimlerChrysler appealed. After consolidating the appeals, the Court of Appeals, METER, P.J., and O'CONNELL and DAVIS, JJ., held that the test cells qualified for the tax exemptions, but the Equinox Line did not. 274 Mich App 108 (2007). The DEQ, the STC, and the cities of Auburn Hills and Dearborn filed separate applications for leave to appeal and Detroit Diesel cross-appealed. The Supreme Court granted all the applications and cross-applications. 480 Mich 880 (2007).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justice CAVANAGH, and an opinion by Justice KELLY, the Supreme Court *held*:

The Court of Appeals judgment is affirmed with respect to its holdings that Detroit Diesel was not entitled to a tax exemption and was not deprived of due process during the STC proceedings, but reversed with respect to its holding that the petitioners' test-cell equipment was eligible for a tax exemption, and the decision of the STC is reinstated.

Justice YOUNG, joined by Chief Justice TAYLOR and Justice CAVANAGH, would hold that the petitioners' test-cell facilities did not qualify for a tax exemption because they were not installed or acquired for the primary purpose of controlling or disposing of air pollution and are therefore not "facilities," and because the equipment itself does not actually and physically curb, control, and eliminate pollution.

Justice KELLY, concurring in the result, agreed with Justice YOUNG's disposition but would hold that the reason the test cells, which are facilities, are not entitled to an exemption is that MCL 324.5903 is ambiguous and, as such, must be strictly construed against the taxpayers, denying them the exemption.

Justice WEAVER, joined by Justices CORRIGAN and MARKMAN, concurring in part and dissenting in part, agreed with Justice YOUNG's conclusions regarding Detroit Diesel, but would hold that the other petitioners' test-cell facilities qualify for tax exemptions under part 59 because they meet the definition of "facility" and the requirements of MCL 324.5903.

Butzel Long (by *Carl Rashid, Jr.*, *Michael F. Smith*, and *Katherine D. Goudie*) for DaimlerChrysler Corporation and Detroit Diesel Corporation.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Jeffrey A. Hyman*, and *Stewart L. Mandell*) for Ford Motor Company.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *John Fordell Leone* and *Ross H. Bishop*, Assistant Attorneys General, for the Michigan Department of Environmental Quality and the Michigan State Tax Commission.

William H. Irving and *Debra A. Walling* for the city of Dearborn.

Secrest Wardle (by *Derk W. Beckerleg*) for the city of Auburn Hills.

YOUNG, J. These consolidated appeals concern a tax exemption that aims to improve Michigan's environment by encouraging entities to reduce air pollution they create in Michigan. Based on the plain language of the statute, we hold that in order to for equipment to be exempt, it must be installed or acquired for the primary purpose of regulating or curbing the spread of pollution in Michigan. Further, the equipment must actually and physically limit pollution. None of the equipment that is the subject of this appeal meets these tests. Therefore, the Court of Appeals erred by partially overturning the decision of the Department of Environmental Quality (DEQ) and the State Tax Commission (STC) to that effect and holding that petitioners' test cells qualify for the exemption. We reverse the Court of Appeals in part and restore the DEQ and STC decisions concluding that none of the equipment qualifies for the tax exemption.

FACTS AND PROCEDURAL HISTORY

The material facts in these consolidated appeals are undisputed. Pursuant to federal law, before issuing a certificate allowing for sales of new vehicles, the Environmental Protection Agency (EPA) must "test or require to be tested" new motor vehicles or new motor vehicle engines to ensure compliance with emission standards that the EPA promulgates.[1] To that end, the agency has created a testing regime, requiring vehicle manufacturers to submit an application with an enormous amount of supporting data.[2] Ford Motor Company, DaimlerChrysler Corporation, and Detroit Diesel

[1] 42 USC 7525(a)(1) and 7521.

[2] See 40 CFR 86.1 *et seq*.

(petitioners) installed test cells. The test cells are large buildings that can replicate many temperature conditions. They also house equipment that allows for up to 40 different types of tests and data collection.[3] Petitioners' test cells are used in the manufacturing process to ensure compliance with the regulations. In addition to its test cell, Detroit Diesel installed a new engine production line to meet federal emissions regulations.

All the petitioners sought tax exemptions from the STC under part 59[4] of the Natural Resources and Environmental Protection Act (NREPA)[5] for their test cells, and Detroit Diesel also petitioned for an exemption for its engine line. Part 59 provides real and personal property tax exemptions, as well as sales and use tax exemptions for certain air pollution control facilities.[6] The law requires that the STC refer applications to the DEQ. The DEQ concluded that none of petitioners' equipment qualified for an exemption under part 59 because its primary purpose was not to reduce pollution, but to test products for compliance with federal emissions standards and to manufacture engines that comply with

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[3] Narrative Statement attached to DaimlerChrysler Auburn Hills Application for Tax Exemption Certificate, July 14, 2003, pp 5-11. The Auburn Hills DaimlerChrysler test cell is similar to the test cells of the other petitioners. The individual specifications of each test cell do not control the disposition of this case. Therefore, this Auburn Hills DaimlerChrysler test cell summary can serve as a general example for purposes of analysis.

[4] MCL 324.5901 *et seq*.

[5] MCL 324.101 *et seq*.

[6] Ford had previously applied for and received a tax exemption under part 59 for its Allen Park test cell facility in 2001. While the applications involved in the instant action were pending in 2004, DEQ notified Ford that it was requesting revocation of its exemption for the Allen Park facility because the facility did not meet the requirements of part 59. The STC rejected the revocation, though, concluding that an exemption certificate under part 59 cannot be revoked. That exemption dispute is not before the Court.

those standards. The DEQ also found that all the equipment actually generated some pollution during the testing or manufacturing processes, instead of physically disposing of air pollution or controlling it as the law requires. The STC agreed and denied all the exemptions. Petitioners appealed to various circuit courts. Ford's four exemption denials were reversed, while denials for DaimlerChrysler and Detroit Diesel were affirmed.

The Court of Appeals granted the appellate applications of all the aggrieved parties and consolidated the cases on appeal. Its published opinion held that tax exemptions must be issued for all petitioners' test cells. The Court of Appeals concluded that the primary purpose of the test cells is to reduce pollution and that they need not physically or directly reduce pollution in order to qualify as tax-exempt. However, the Court of Appeals affirmed the denial of an exemption for Detroit Diesel's engine manufacturing line on the ground that its primary purpose was engine manufacturing, not pollution reduction. The Court also held that no due process violation occurred during the STC's consideration of Detroit Diesel's application for a tax exemption.[7] This Court granted leave to appeal.[8]

STANDARD OF REVIEW

The Court reviews de novo motions for summary disposition.[9] Issues of statutory construction are also reviewed de novo.[10]

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[7] We agree with the Court of Appeals that the full hearing conducted by the STC satisfied Detroit Diesel's due process rights.

[8] 480 Mich 880 (2007).

[9] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[10] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

ANALYSIS

The primary issue on appeal is whether the Court of Appeals erred in its application of the tax exemption of part 59 of NREPA. As noted, the Court of Appeals reached different conclusions for the petitioners' test cells and Detroit Diesel's engine line. With regard to the test cells, the Court held:

> [I]t is plainly apparent to us that the test cells were "installed or acquired for the primary purpose of controlling or disposing of air pollution" and that the test cells were designed and are operated "primarily for the control, capture, and removal of pollutants from the air, and [are] suitable, reasonably adequate, and meet[] the intent and purposes of part 55 . . . ."[11]

However, with regard to Detroit Diesel's engine line, the Court reached the opposite conclusion, holding that "[c]learly, the engine line . . . is not 'operated primarily for the control, capture, and removal of pollutants from the air . . . .' "[12]

While the Court of Appeals quoted language from the proper statutory provisions, the Court did not offer a construction of that language. Instead, the Court held that it was plain and clear which equipment was eligible and which was not. As will be discussed later, the statutory provisions provide no principled basis for distinguishing between the different equipment involved in this appeal. Under the plain language of these provisions, neither the test cells nor the engine line qualifies for the exemption.

MCL 324.5901 defines "facility," in part, as

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[11] *Ford Motor Co v State Tax Comm*, 274 Mich App 108, 113; 732 NW2d 591 (2007) (alterations in *Ford Motor*).

[12] *Id*. at 118.

> machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state.

An exemption for a particular "facility" requires a determination by the DEQ that "the facility is *designed and operated primarily for the control, capture, and removal of pollutants from the air*, and is suitable, reasonably adequate, and meets the intent and purposes of part 55[13] and rules promulgated under that part."[14]

Thus, the equipment must meet the requirements of both §§ 5901 and 5903 to qualify for the tax exemption. Section 5901's definition of "facility" expressly requires that the equipment be "installed or acquired for the primary purpose of *controlling* or *disposing of* air pollution . . . ." "Control" means to "exercise restraint or direction over; dominate, regulate, or command; to hold in check; curb."[15] "Dispose of" means "a. to deal with conclusively; settle. b. to get rid of; discard or destroy."[16]

The primary purpose of this equipment is to build engines (Detroit Diesel) or test engines (petitioners' test cells). The ancillary effect of the equipment is the control of pollution emitted by the engines. While the test cells help petitioners ensure that they are producing less polluting engines, the *primary* purpose of this equipment is not to regulate, curb the spread of, or destroy air pollution—and certainly not "pollution that

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[13] MCL 324.5501 *et seq*.

[14] MCL 324.5903 (emphasis added).

[15] *Webster's Universal College Dictionary* (1997).

[16] *Random House Webster's College Dictionary* (1997).

if released would render the air harmful . . . to the public health or to property *within this state*."[17] Instead, the primary purpose of the equipment is to *test* engines to ensure that petitioners have properly designed their engines to meet federal regulations so that they can sell them to consumers.[18] Furthermore, the equipment itself does not get rid of or curb air pollution. Thus, petitioners' test cells are *not* "facilities" as defined by MCL 324.5901.

Even assuming that petitioners' federally required pollution equipment and Detroit Diesel's engine line qualify as "facilities," petitioners are still not entitled to an exemption because none of the equipment qualifies under § 5903. Under that section, the DEQ must find "that the facility is *designed and operated* primarily for the *control, capture, and removal* of pollutants from the air." There are a number of terms in this provision that need to be defined to properly construe it. The focus of

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[17] MCL 324.5901 (emphasis added). The dissent is correct that the statute does not require that the equipment "solely" control pollution in Michigan. However, this equipment does not control *any* pollution in Michigan. It is the engines and vehicles tested that emit less pollution. While those vehicles may be sold in Michigan and may emit less pollution than other vehicles sold in Michigan, the *test cells* and Detroit Diesel's engine plant do not control any pollution in Michigan or any other state.

[18] The dissent misconstrues this statement to argue that this interpretation would render any equipment required by a federal regulation ineligible for the exemption. Regardless of whether the federal government requires the installation of the pollution testing equipment, it is not a "facility" under this statute unless its primary purpose is pollution control or disposal. For example, in *Covert Twp v State Tax Comm*, 407 Mich 561; 287 NW2d 895 (1980), federal law required that the petitioner install a containment device at its nuclear facility. That equipment still qualified under the statute at issue because its primary purpose was to control pollution at the site in the case of an accident at the nuclear facility. The primary purpose of the test cells and Detroit Diesel's engine plant is not control or disposal of pollution. Therefore, regardless of whether federal law or "philanthropy" motivated petitioners to install the test cells or the engine plant, they do not qualify for the exemption.

the section is on the "design" and the "operation" of the facility. "Design" means "to intend for a definite purpose," while "operate" means "to work, perform, or function, as a machine does . . . to bring about, effect, or produce, as by action or the exertion of force or influence."[19] Thus, the facility must be intended to and bring about "the control, capture, and removal of pollutants from the air." "Control" has already been defined. "Capture" means "to gain control of or exert influence over," and "remove" means "to move or shift from a place or position; to eliminate; do away with or put an end to."[20] Because the Legislature used the conjunction "and," a qualifying facility must do all three things: curb, control, and eliminate pollution. Furthermore, the words suggest that the facility must actually and physically limit pollution. They do not stand for the proposition that the facility itself may contribute to the creation of a product that pollutes less than a similar product, which is what the equipment in this case does. Because the statutory language requires the *facility* to do the removing, controlling, and capturing of pollution, this equipment does not qualify.

The Court of Appeals held that the test cells qualified under § 5903 "because without the test cells, [petitioners] would not be able to ensure that their *products* are adequately controlling, capturing, and removing pollutants from the air as compared to earlier versions of their vehicles and engines."[21] This observation misses the mark. The fact that the federal government may require such pollution control testing equipment has nothing to do with its eligibility for a tax exemption under Michigan law. The dissent makes a similar ana-

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[19] *Random House Webster's College Dictionary* (1997).

[20] *Id*.

[21] *Ford Motor*, *supra* at 114 (emphasis added).

lytic mistake, asserting that the test cells qualify because they "control" pollution "by regulating the emissions output" and "by curbing the levels of pollutants released into the air in the first place"; they "capture" pollution by "ensur[ing] that pollutants that would otherwise have been released into the atmosphere are never produced in the first place"; and they "remove" pollution "by preventing the pollutants from being created in the first place."[22] The problem with both of these analyses is that the *test cells*, much like Detroit Diesel's engine line, are not the source of the removal, control, or capture of pollution as required by the exemption. The testing process both produces and releases pollution contrary to the requirements of the statute. The *design of the engine*, and the engine alone once put into manufacture and sold in a vehicle, accomplishes the removal, control, and capture of pollution because such an engine produces less pollution than other models. Without the changes to the design of the engine, the test cells would accomplish nothing. Because the statutory language requires the *facility* to do the removing, controlling, and capturing, and the test cells and the pollution testing equipment in the engine plant do not remove, control, or capture pollutants, this equipment does not qualify for the tax exemption. Furthermore, none of the pollution control created by redesigned engines tested by petitioners is intended to improve the quality of *Michigan's* air. This fact does not trouble the Court of Appeals or the dissent, which must presume that our Legislature intended a gift from Michigan taxpayers to the nation by advancing national, rather than local, air quality goals.

Moreover, the Court of Appeals opinion does not directly address the requirement that a facility must

[22] *Post* at 255.

"meet[] the intent and purposes of part 55" of NREPA.[23] A review of the other provisions in part 55 leaves little question that part 55 regulates the construction and operation of sources of air pollution, and part 55 itself defines "source" as "a stationary source."[24] The dissent

[23] The dissent asserts that the purpose of that part is the prevention and abatement of air pollution. In addition to being overly simplistic, this interpretation, when applied to MCL 324.5903, violates the rule of statutory construction that the Court should not interpret a statute in a way that renders part of it nugatory or mere surplusage. *Grimes v Dep't of Transportation*, 475 Mich 72, 89; 715 NW2d 275 (2006). MCL 324.5903 provides: "If the department finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 and rules promulgated under that part, the department shall notify the state tax commission, which shall issue a certificate." Thus, the statute requires that the "facility" control, capture, and remove pollutants *and* meet the intent and purposes of part 55. If the dissent is correct that the "intent and purposes" of part 55 are simply the reduction of pollution, then that requirement adds nothing to the first requirement. However, our interpretation that the "intent and purposes" of part 55 are the reduction of pollution at *stationary* sources adds something to the first requirement, namely a specific source of pollution that is to be targeted.

[24] MCL 324.5501(t). The dissent decries our effort to ascertain the intent and purposes of part 55 by considering the whole of part 55. The dissent would prefer to look at one sentence of § 5540 of part 55 that supports the dissent's result to ascertain the intent and purposes of part 55.

The entirety of § 5540 is:

> It is the purpose of this part to provide additional and cumulative remedies to prevent and abate air pollution. This part does not abridge or alter rights of action or remedies now or hereafter existing. This part or anything done by virtue of this part shall not be construed as estopping persons from the exercise of their respective rights to suppress nuisances or to prevent or abate air pollution. [MCL 324.5540.]

The clear import of this section is that part 55 provides *additional remedies* to the existing remedies for the prevention or control of air pollution, namely private nuisance suits or citizen suits under MCL

attempts to overcome this fact by focusing on the definition of "air pollution control equipment," MCL 324.5501(c), arguing that because that definition is arguably broad enough to encompass petitioners' test cells, the test cells must fall within the "intent and purposes of part 55." The dissent's analysis of the definition of "air pollution control equipment" must occur in a vacuum to reach its conclusion.[25] The air pollution control equipment is only relevant to the control of pollution at "sources" and in "processes." A "process" is defined as "an action, operation, or a series of actions or operations *at a source* that emits or has the potential to emit an air contaminant." MCL 324.5501(p) (emphasis added). Therefore, the fact that, as the dissent argues, a test cell theoretically qualifies as "air pollution control equipment" is wholly irrelevant for purposes of part 55 because the test cell has no effect on air pollution at any source or in any process.

324.1701. This section does not stand for the idea that the intent and purposes of part 55 are to control air pollution in all its forms and from any source, as the dissent asserts.

The dissent misconstrues the import of this discussion of § 5540. Unlike the dissent, we do not believe that the "intent and purposes" of part 55 are contained solely in § 5540. Instead, as noted, we believe that the *entirety* of part 55 should be considered to determine its "intent and purposes." Therefore, we think it is unnecessary "to explain how pollution-control facilities other than the test cells can provide 'additional remedies' that the test cells cannot." *Post* at 258.

[25] Similarly, the dissent has chosen the one subsection of MCL 324.5512(1) that references "mode[s] of transportation" to bolster its conclusion that the test cells meet the intent and purposes of part 55. Unfortunately, most of the subsections of MCL 324.5512(1) deal with "stationary sources" in accordance with the "intent and purposes" of part 55. We are uncertain why the Legislature decided to confer rulemaking authority with regard to modes of transportation in part 55; however, we do not believe that this one subsection alters the fact that the "intent and purposes of part 55 and rules promulgated under that part" are to regulate air pollution from stationary sources. See Mich Admin Code, R 336.1101 *et seq*.

Part 55 provides for permitting, monitoring to ensure compliance, reporting, and imposing sanctions for violations. Notably, emissions from vessels and motor vehicles are covered in parts 61, 63, and 65. The inescapable conclusion is that part 55 serves to regulate air pollution from *stationary sources*, while air pollution from mobile sources is covered by other parts of NREPA. Nothing about the test cells affects air pollution from a stationary source; in fact, as stated, a test cell itself *adds* contaminants to the air in its location. If reduction of vehicle emissions qualifies as meeting the purpose of part 55, then the vehicles themselves would also qualify. Likewise, any auto repair shop could claim as exempt any equipment it installed to test motor vehicle exhaust for excess pollution.

The Court of Appeals and the dissent simply fail to give meaning to part 55. In so doing, they have broadly construed this tax statute, contrary to the rule of construction that exemptions be narrowly construed against the taxpayer;[26] distorted the purpose of this tax statute; and awarded taxpayer money to business entities who fail to abate pollution in this state. In fact, the dissent actively conflates part 55 with the other parts of NREPA by concluding, "[a]s long as petitioners sell engines and vehicles in Michigan, thereby reducing harmful pollution in Michigan, the fact that they also sell engines and vehicles in other states, thereby reducing pollution in those states as well, does not prevent them from qualifying for the instant tax exemption."[27]

The two published opinions interpreting this part of NREPA support the conclusion that the exemption does not apply to petitioners' equipment. In *Meijer, Inc v*

[26] See *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 207; 713 NW2d 734 (2006), and *post* at 248.

[27] *Post* at 253 n 15.

State Tax Comm,[28] the Court of Appeals held that a trash compactor and baler, which Meijer installed to replace an incinerator that polluted the air when burning trash from Meijer's grocery stores, was eligible for the tax exemption under MCL 336.1 (the predecessor to MCL 324.5901). In the second case, *Covert Twp Assessor v State Tax Comm*,[29] this Court upheld the STC's grant of a tax exemption to Consumers Power Company for a nuclear containment building at its nuclear power plant. Both of these cases concerned sources of pollution that would have been subject to the regulatory statutes of part 55.

This Court's decision in *Covert* interpreted "primary purpose" to mean "the primary purpose served by the facility for which [the] exemption is sought."[30] While the equipment in *Covert* was installed pursuant to federal law, this Court stated that the "purpose served" need not "align with the motivation of" those installing the facilities.[31] Nonetheless, the *statute* requires that the primary purpose be the control or disposal of air pollution. The equipment in *Covert* was installed to prevent the release of hazardous materials in the event of an accident at the petitioner's nuclear facility in this state. Therefore, the primary purpose was the control of air pollution in the event of an accident. That primary purpose qualified the equipment for the tax exemption.

Similarly, the "facility" in *Meijer*, a compactor and baler, actually served the primary purpose of controlling pollution in Michigan. The *Meijer* petitioner installed the compactor and baler to replace its incinerator because the incinerator produced pollution in excess of

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[28] 66 Mich App 280; 238 NW2d 582 (1975).

[29] 407 Mich 561; 287 NW2d 895 (1980).

[30] *Id*. at 580.

[31] *Id.* at 580-581.

the amount allowed under the law. The compactor and baler accomplished the same task as the incinerator while producing less pollution.[32]

Contrary to the Court of Appeals conclusion, the test cells are not analogous to the compactor and baler because the test cells did not replace a more polluting testing process. As noted by the *Meijer* panel, "had no pollution problem existed, and appellee simply chose the *method* of waste disposal by compacting and baling in order to dispose of waste, it would be ineligible for tax exemption because the necessary element—primary pollution control purposes—would be lacking."[33] The facilities in the instant case were installed for the primary purpose of testing engines, which will theoretically produce less pollution than other engines once put into production. However, petitioners simply chose a method of testing. They did not install the test cells to replace a process that accomplishes the same task with more pollution. Thus, the Court of Appeals and the dissent erroneously relied on *Meijer* to conclude that ancillary equipment installed primarily for the purpose of *testing* other equipment also qualifies for the exemption.

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[32] The dissent argues that under our interpretation of MCL 324.5901, the compactor and baler would not qualify as a facility because the equipment simply compresses or bales material. This argument misconstrues both our interpretation and the facts of *Meijer*. The *Meijer* petitioner had been disposing of its refuse with an incinerator that produced an abundance of pollution. As noted, the petitioner installed the compactor and baler for the primary purpose of controlling the air pollution produced by its refuse disposal system. Furthermore, when the compactor and baler were operated they actually "controlled, captured, and removed" pollutants at that site. The test cells simply do not perform these functions. Any reduction of pollution that is connected to the test cells is entirely contingent on the redesign and manufacture of the engines and vehicles that may be introduced for future sales across the country.

[33] *Meijer*, *supra* at 285.

The clear import of these cases and the statute is that the "facility" must reduce the air pollution caused by the *operation* of the petitioner's Michigan site to qualify for the tax exemption. However, the dissent argues that the reduction of air pollution caused by the petitioner's engine products—well after those products have left the petitioner's control—can qualify the testing equipment used to manufacture those products for the exemption. This interpretation expands the exemption statute far beyond its plain meaning and contrary to any rationale that our Legislature entertained for affecting this state's environment.

CONCLUSION

In denying DaimlerChrysler's application for its Auburn Hills test cell, the DEQ listed the following "Non-Air Pollution Function(s) of Equipment": "The testing of vehicles is one of the manufacturing steps that the applicant takes in researching, designing, manufacturing, testing, marketing and selling vehicles."[34] In the "comments" section, the DEQ states:

> Testing vehicles at the Chrysler Technical Center actually generates and emits air contaminants. None of the requested equipment controls, capture [sic] or removes pollutants generated by the vehicle testing equipment. The applicant has not satisfied its burden of establishing that its described machinery, equipment, structures, or related accessories were installed or acquired and designed and operated to physically control, dispose, capture, and/or remove air pollutants from the air, that if released would render the air harmful, pursuant to the intent of Sections 5901 and 5903 of Part 59, as separate and distinct from apparent other purposes of measuring, recording and assessing data to determine if a product is fit for continued

[34] DEQ Tax Exemption Review, December 15, 2003. The DEQ reached the same conclusion with regard to the other petitioners' test cells.

> production or commercial sales, or for other research, manufacturing, marketing or sales purposes. The Department finds that the applicant has not established a primary purpose qualifying for a tax exemption under Part 59.[35]

The DEQ properly applied §§ 5901 and 5903 and concluded that the test cells do not qualify for a tax exemption. Therefore, we reverse the Court of Appeals and reinstate the STC's decision denying petitioners' request for tax exemptions for their test cells. However, we affirm the Court of Appeals holding that the Detroit Diesel Equinox Line was not entitled to a tax exemption and that Detroit Diesel received due process.

TAYLOR, C.J., and CAVANAGH, J., concurred with YOUNG, J.

KELLY, J. (*concurring in the result*). Justice YOUNG and Justice WEAVER disagree about whether the test cells at Ford Motor Company, DaimlerChrysler Corporation, and Detroit Diesel Corporation are entitled to tax-exemption certificates. The justices reasonably apply the statutory language, but reach opposite conclusions. In this situation, judicial construction should be brought to bear to resolve the issue. When the applicable canon of interpretation is applied, it becomes apparent that the test cells are not entitled to tax-exemption certificates. Thus, although I disagree with some of his reasoning, I concur in the result of Justice YOUNG's opinion.

In addition, I agree with both Justice WEAVER and Justice YOUNG that the Detroit Diesel Corporation engine production equipment is not entitled to a tax-exemption certificate. Finally, I agree that the corporation received a full hearing before the STC that satisfied its due process rights.

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[35] *Id.*

THE TWO-PART TEST OF NREPA

The issue that divides Justice YOUNG and Justice WEAVER is whether the test cells qualify for tax-exemption certificates under part 59 of the Natural Resources and Environmental Protection Act (NREPA).[1] For purposes of this case, the key provisions of part 59 are §§ 5901 and 5903. Section 5901 sets forth the definition of "facility." It provides in relevant part:

> As used in this part, "facility" means machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state. . . .

Section 5903 explains when a "facility" is entitled to a tax-exemption certificate. It states:

> If the department finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 and rules promulgated under that part, the department shall notify the state tax commission, which shall issue a certificate. The effective date of the certificate is the date on which the certificate is issued.

Using these statutes, a two-part test must be applied to determine whether the test cells are entitled to tax-exemption certificates. First, the test cells must qualify as a "facility" under § 5901. Second, the "facility" must meet the additional requirements set forth in § 5903.

SECTION 5901

With respect to the first consideration, the test cells are facilities if they are (1) machinery, equipment,

[1] MCL 324.5901 *et seq*.

structures, or any part or accessories of machinery, equipment, or structures and (2) installed or acquired for the primary purpose of controlling or disposing of air pollution (3) that if released would render the air harmful or inimical to the public health or to property within this state. It is uncontested that the test cells are machinery, equipment, or structures. The dispute is over the other two statutory requirements.

Respondents argue that the test cells were not installed or acquired for the primary purpose of controlling or disposing of air pollution. I disagree. Petitioners installed the test cells solely to comply with pollution laws. The test cells have no other purpose. Were it not for pollution laws, petitioners could build their products without the need for test cells. In fact, it would be cheaper for them to do so. Thus, it seems clear to me that the primary purpose of installing test cells was to control air pollution.

Respondents also argue that the test cells do not qualify as facilities because their primary purpose is not to control or dispose of pollution within Michigan. I reject this argument because the statute does not require that the primary purpose of the equipment be to improve air quality in Michigan. Instead, the statutory command is satisfied if the pollution that the equipment is concerned with controlling or disposing of, if released, would "render the air harmful or inimical to the public health or to property within this state." The command is satisfied here. If the pollutants that the test cells are concerned with controlling were released into the air, they would be harmful to the public health and property within the state.

Finally, respondents argue that the test cells are not facilities because they create a small amount of pollution. This fact is irrelevant. The test cells are facilities if

their primary purpose is controlling or disposing of pollutants that, if released, would be harmful to the public health and property within this state. These requirements are satisfied.

SECTION 5903

The next step of the inquiry is to determine if the test-cell facilities meet the requirements of § 5903. A facility is entitled to a tax-exemption certificate under this section if it is (1) designed and operated primarily for the control, capture, and removal of pollutants from the air, (2) suitable, reasonably adequate, and (3) meets the intent and purposes of part 55 of the act.

Notably, § 5903 requires the "facility" to be "designed and operated primarily for the control, capture, *and* removal of pollutants from the air." This differs from § 5901, which requires the test cells to be "installed or acquired for the primary purpose of controlling *or* disposing of air pollution." It must be assumed that this difference in wording is purposeful. As a result, § 5903 imposes a more stringent requirement than § 5901. Accordingly, it does not follow from the fact that the test cells qualify as "facilities" that they are "designed and operated primarily for the control, capture, *and* removal of pollutants from the air."

The test cells do not actually remove pollution that is already in the air. Instead, they are part of a process that reduces the amount of pollution in the air by preventing the creation of pollutants. Because the test cells are not concerned with pollutants that are already in the air, it can be argued that the test cells are not "designed and operated primarily for the control, capture, and *removal of pollutants from the air*." There is some merit to this argument. Accordingly, I believe that

it is reasonable to decide that the test cells do not qualify for tax-exemption certificates. This is the result reached by Justice YOUNG.

On the other hand, the test cells are operated solely in an effort to comply with federal pollution standards. By complying with these standards, the quantity of pollutants in the air is reduced. Considering that the test cells are part of a process that eliminates the creation of pollutants, they remove pollutants that would otherwise be in the air. The statute does not explicitly require the facility to remove pollutants that are already in the air. Hence, I believe that it is also reasonable to decide that the facilities are entitled to tax-exemption certificates. Justice WEAVER reaches this conclusion.

Because I believe that both Justice YOUNG's and Justice WEAVER's constructions of the statute are reasonable, I conclude that the correct application of the statute to the facts of this case is uncertain. As a consequence, the statute is ambiguous.[2] The remaining provisions of NREPA do not clarify this ambiguity. Accordingly, I conclude that it is appropriate to turn to sources outside the statutory language to resolve the case.

THE EFFECT OF DEQ RULINGS AND CASELAW

Both sides claim that the rule that deference is owed to administrative interpretations supports their position. The Department of Environmental Quality (DEQ), which is authorized to determine eligibility for part 59 tax exemptions, decided that the test cells at

[2] A statute is ambiguous when its application to the facts of the case is uncertain. *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 150; 549 NW2d 837 (1996).

issue are not entitled to tax-exemption certificates. However, this decision is inconsistent with at least one recent DEQ decision that granted a tax-exemption certificate to a test-cell facility. Accordingly, because the DEQ's current interpretation is inconsistent with another of its recent interpretations, it does not weigh heavily in favor of either position.

The parties also identify prior published court opinions interpreting part 59 as supporting their positions. But these opinions do not resolve the present case. In *Covert Twp Assessor v State Tax Comm*,[3] the facilities at issue controlled, captured, and removed discharges resulting from a nuclear accident.[4] Accordingly, the facilities' primary concern was with pollutants that had already been created. This differs from the test cells involved here that have a goal of preventing pollutants from ever being created. Thus, that case is not on point because the facts were materially different. The other case, *Meijer, Inc v State Tax Comm*,[5] is also not directly on point. Furthermore, it is a Court of Appeals decision. As such, it is not binding on this Court.

Finally, we are directed to decisions of other states interpreting their tax-exemption statutes. Given that these cases involve statutes that differ from Michigan's statutes, I find them of little assistance in determining the proper interpretation of the Michigan statute.

THE CANONS OF STATUTORY CONSTRUCTION

Because I cannot resolve the issue using the statute's language alone and the other sources I have mentioned

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[3] *Covert Twp Assessor v State Tax Comm,* 407 Mich 561; 287 NW2d 895 (1980).

[4] *Id.* at 580.

[5] *Meijer, Inc v State Tax Comm,* 66 Mich App 280; 238 NW2d 582 (1975).

do not point in either direction, I turn to the canons of construction. Most applicable is the well-established canon that tax exemptions are to be strictly construed.[6] When this canon is applied, test-cell facilities are exempt from taxation only if the statutory language does not allow another construction. But another construction is not only possible, but reasonable. As a result, I conclude that the test cells are not entitled to tax-exemption certificates.

CONCLUSION

I conclude that the test cells qualify as facilities under § 5901, but that the correct application of § 5903 is unclear. DEQ rulings and existing caselaw are not dispositive of the issue. As a result, I engage in judicial construction to determine whether the facilities are entitled to tax-exemption certificates.

The appropriate canon of construction is that tax exemptions are to be strictly construed. By strictly construing the exemption in question, I conclude that the test-cell facilities are not entitled to tax-exemption certificates. As a consequence, I concur with Justice YOUNG's resolution of this issue. I also agree that Detroit Diesel's engine line is not eligible for the tax exemption. Therefore, I agree with Justice YOUNG that the Court of Appeals decision should be partially affirmed and partially reversed.

WEAVER, J. (*concurring in part and dissenting in part*). I concur with the lead opinion's holding that Detroit Diesel's Equinox Line does not qualify for tax exemptions under part 59 of the Natural Resources and

[6] See, e.g., *East Saginaw Mfg Co v East Saginaw*, 19 Mich 259, 279 (1869); *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664; 378 NW2d 737 (1985).

Environmental Protection Act (NREPA)[1] because the Equinox Line was not installed for the primary purpose of controlling or disposing of air pollution, but was instead installed for the primary purpose of producing a new type of vehicle engine for sale. However, I dissent from the lead opinion's holding that petitioners' test-cell facilities do not qualify for tax exemption under part 59. I would affirm the Court of Appeals and hold that petitioners' test-cell facilities qualify for tax exemptions under part 59 because they meet the definition of "facility" in MCL 324.5901 and, under MCL 324.5903, are "designed and operated primarily for the control, capture, and removal of pollutants from the air," are "suitable" or "reasonably adequate" at abating air pollution, and "meet the intent and purposes of part 55" of NREPA, MCL 324.5501 *et seq.*, which regulates air pollution.

I. FACTS AND PROCEEDINGS

The material facts in these seven consolidated cases are undisputed. Petitioners, Ford Motor Company, DaimlerChrysler, and Detroit Diesel, manufacture motor vehicles and engines. Petitioners' vehicles and engines are subject to federal air-quality regulations promulgated by the Environmental Protection Agency (EPA).[2] The vehicles and engines must pass EPA-mandated emissions tests before the vehicles and engines can be mass-produced and sold to consumers. Each of the petitioners established "test cell" facilities designed to test vehicle and engine emissions to ensure compliance with EPA regulations. In the test cells, vehicles and engines are placed in a closed room or a bay with a hose attached to the exhaust pipe. While the

[1] MCL 324.5901 *et seq.*

[2] See 42 USC 7401 *et seq.*

vehicle or engine is emitting exhaust, samples of the exhaust are sent through devices that measure the emissions and determine whether those emissions comply with federal regulations. The test cells then release the tested emissions into the air.

In addition to a test-cell facility, Detroit Diesel built its Equinox Line facility after its existing Series 60 diesel engine failed to meet the newly enacted EPA emission standards. The Equinox Line facility was designed to manufacture new diesel engines that meet the newest federal pollution-control standards. In October 2002, after Detroit Diesel made significant design changes to the original Series 60 engine, Detroit Diesel's new Equinox Line of diesel engines obtained EPA certification.

In 2001, Ford Motor Company filed for tax exemptions for test cells and equipment under part 59 of NREPA,[3] which permits tax exemptions for certain facilities that reduce air pollution. This application was granted by the State Tax Commission (STC) after review and approval by the Michigan Department of Environmental Quality (DEQ). In 2003 and 2004, Ford, DaimlerChrysler, and Detroit Diesel filed for multiple exemptions under part 59 for similar test-cell facilities located around the state. Additionally, in 2003 Detroit Diesel applied for tax exemptions for its Equinox Line facility. The STC referred the exemption requests to the DEQ, which concluded that the test-cell facilities and the Equinox Line facility did not meet the requirements for a part 59 tax exemption.

The DEQ concluded that the primary purpose of the test cells was to enable petitioners to sell their vehicles by complying with federal law, not to reduce pollution.

[3] MCL 324.5901 *et seq*.

The DEQ explained that the test cells did not qualify for the exemption because they did not physically remove or control pollution, but rather actually created pollution during the testing process. In regard to Detroit Diesel's Equinox Line, the DEQ determined that it was not a qualifying facility under part 59 because its primary purpose was "to manufacture diesel engines for sale by Detroit Diesel." The DEQ determined that because the air emissions from the Equinox Line manufacturing facility were not significantly different from those emitted by the Series 60 facility, the Equinox Line did not qualify as a "process change" under part 59 that met the goal of reducing pollution. As a result, the STC rejected the tax exemption requests for the test-cell facilities and the Equinox Line facility.

In separate lawsuits, petitioners appealed to various circuit courts. In Ford's suits, the Wayne Circuit Court reversed the STC's denials of the tax-exemption applications, ruling that the court was constrained by *Meijer, Inc v State Tax Comm*, 66 Mich App 280; 238 NW2d 582 (1975), to conclude that the test-cell facilities met the part 59 requirements because they were ancillary equipment for the control of pollution. The city of Dearborn, an intervening respondent, filed four separate applications in the Court of Appeals, arguing that the circuit court had improperly overturned fact-finding of the administrative agency.

In Detroit Diesel's suit, the Wayne Circuit Court affirmed the STC's decision because there was competent, material, and substantial evidence supporting the STC's conclusion that the test cells and the Equinox Line do not actually remove pollution, but rather operate for the primary purpose of producing engines for sale. Detroit Diesel applied for leave to appeal in the Court of Appeals.

In DaimlerChrysler's suits, the Oakland Circuit Court affirmed the STC's decisions, holding that there was competent, material, and substantial evidence for the STC's conclusion that the test cells do not actually remove pollution and that the primary purpose for the test cells was to ensure that DaimlerChrysler's vehicles were sellable. DaimlerChrysler applied for leave to appeal in the Court of Appeals.

The Court of Appeals issued an order consolidating all the appeals. The Court of Appeals, in a published opinion, held that all the test-cell facilities met the requirements of the part 59 tax exemption as a matter of law, but that Detroit Diesel's Equinox Line facility did not.[4] The panel concluded that the test cells qualified for tax-exemption certificates because petitioners installed the test cells solely to ensure compliance with EPA emission standards. Thus, the test cells were installed for the primary purpose of controlling or disposing of air pollution and were designed and operated primarily for the control, capture, and removal of pollutants from the air. The panel held that Detroit Diesel's Equinox Line did not meet the requirements of part 59 because it was operated primarily for production of a new type of engine for sale, not for the control, capture, or removal of pollutants in the air. The Court of Appeals also rejected Detroit Diesel's claims that the STC's hearing process violated the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, and due-process principles.

The DEQ and the STC filed separate applications for leave to appeal in each case. Detroit Diesel cross-appealed. The city of Auburn Hills appealed the decision regarding DaimlerChrysler's Auburn Hills test

[4] *Ford Motor Co v State Tax Comm*, 274 Mich App 108; 732 NW2d 591 (2007).

cell, and the city of Dearborn appealed the decision involving Ford's Dearborn test cell. This Court granted all the applications for leave to appeal or cross-appeal.[5]

II. STANDARD OF REVIEW

This case involves the interpretation of part 59 of NREPA. This Court reviews questions of statutory interpretation de novo.[6] Clear and unambiguous statutory language is given its plain meaning and is enforced as written.[7]

Further, this case involves review of the STC's and the DEQ's interpretation and application of part 59. This Court reviews final decisions from administrative agencies by determining whether they are authorized by law and whether they are supported by competent, material, and substantial evidence on the whole record.[8] Although this Court affords respectful consideration to the construction of statutory provisions by any particular department of the government, the department's interpretation is not binding on this Court and cannot be used to overcome the statute's unambiguous meaning.[9] Furthermore, this Court owes no deference to an agency determination when an agency issues contradictory rulings on the same issue and changes its policy mid-course, as the DEQ has in this case. " 'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this

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[5] *DaimlerChrysler Corp v State Tax Comm*, 480 Mich 880 (2007).

[6] *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005).

[7] *Id.* at 716.

[8] *Reed v Hurley Medical Ctr,* 153 Mich App 71, 75; 395 NW2d 12 (1986); MCL 24.306.

[9] *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 23-24; 678 NW2d 619 (2004).

requires more than a scintilla of evidence, it may be substantially less than a preponderance."[10]

III. PART 59 TAX EXEMPTIONS

Part 59 of NREPA provides real property, personal property, sales, and use tax exemptions for certain facilities designed to reduce air pollutants. Tax exemptions are strictly construed against the taxpayer.[11] However, the Court interprets the statutory language creating the tax exemption according to common and approved usage.[12] In order to qualify for the tax exemptions under part 59, the property in question must first meet the definition of "facility" in part 59. Part 59 defines "facility" as follows:

> [M]achinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, *installed or acquired for the primary purpose of controlling or disposing of air pollution* that if released would render the

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[10] *Dep't of Community Health v Risch*, 274 Mich App 365, 372-373; 733 NW2d 403 (2007) (citation and quotation marks omitted). The city of Dearborn argues in its application that the STC's decision to deny Ford's application for a tax exemption was supported by competent, material, and substantial evidence on the record and should therefore not be disturbed on appeal. We reject this argument because it is based on the incorrect assumption that the circuit court reversed the STC on a purely factual basis, instead of a legal one. On appeal, the Court of Appeals did not consider whether the STC's decision to deny Ford's application for a tax exemption was unsupported by factual evidence. Rather, the Court of Appeals held that the STC's legal rulings were erroneous as a matter of law. Under MCL 24.306 of the APA, a reviewing court can set aside the STC's decision on a legal basis *or* on a factual basis if the facts are not supported by competent, material, and substantial evidence. Therefore, the Court of Appeals was free to rule that the STC's decision was legally erroneous, even if it was supported by competent, material, and substantial evidence.

[11] *Elias Bros Restaurants, Inc v Dep't of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996).

[12] *Id*.

> air harmful or inimical to the public health or to property *within this state*. Facility includes an incinerator equipped with a pollution abatement device in effective operation. Facility does not include an air conditioner, dust collector, fan, or other similar facility for the benefit of personnel or of a business. Facility also means the following, if the installation was completed on or after July 23, 1965:
>
> (a) Conversion or modification of a fuel burning system to effect air pollution control. The fuel burner portion only of the system is eligible for tax exemption.
>
> (b) Installation of a new fuel burning system to effect air pollution control. The fuel burner portion only of the system is eligible for tax exemption.
>
> (c) *A process change involving production equipment made to satisfy the requirements of part 55 and rules promulgated under that part.* The maximum cost allowed shall be 25% of the cost of the new process unit but shall not exceed the cost of the conventional control equipment applied on the basis of the new process production rate on the preexisting process. [MCL 324.5901 (emphasis added).]

After property has been designated as a facility under MCL 324.5901, the facility must meet the following further requirements in order to qualify for tax exemptions:

> If the department finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 and rules promulgated under that part, the department shall notify the state tax commission, which shall issue a certificate. . . . [MCL 324.5903.]

Therefore, property must meet the definition of "facility" under MCL 324.5901, *and*, under MCL 324.5903, (1) be "designed and operated primarily for the control, capture, and removal of pollutants from the air," (2) be "suitable, reasonably adequate," and (3) "meet the

intent and purposes of part 55" in order to qualify for tax exemptions under part 59.

A. *TEST-CELL FACILITIES*

I dissent from the lead opinion, and would hold that the petitioners' test-cell facilities qualify for tax exemptions under part 59. In order to determine whether the petitioners' test-cell facilities qualify for tax exemptions, it is necessary to first determine whether the test-cell facilities are "facilities" under MCL 324.5901. MCL 324.5901 unambiguously defines a facility as including "machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, *installed or acquired for the primary purpose of controlling or disposing of air pollution* that if released would render the air harmful or inimical to the public health or to property within this state." (Emphasis added.)

Accordingly, it is necessary to determine whether the test cells were installed or acquired for the primary purpose of controlling or disposing of air pollution in Michigan. An ordinary meaning of "control" means to "exercise restraint or direction over; dominate, regulate, or command; to hold in check; curb."[13] It is undisputed that petitioners installed and operated the test cells for the sole purpose of regulating emissions to meet federal standards and curb emissions output in the engines and vehicles produced. Regulating and curbing emissions is thus a method of controlling emissions.

The STC and the DEQ argue that petitioners did not install the test cells with the primary motive of controlling emissions because the test cells were installed to

[13] *Webster's Universal College Dictionary* (1997).

create vehicles conforming to EPA regulations. However, the petitioners' motive behind installing the test cells is not determinative of the primary purpose of the test cells. It is immaterial that the test cells were created so that the petitioners' engine and vehicle emissions would satisfy federal emissions regulations:

> The use of the words "primary purpose" in § 1 [now MCL 324.5901], and "operated primarily for" in § 3 [now MCL 324.5903] of the Air Exemption Act [now part 59] evidences a legislative concern with the primary purpose served by the facility for which exemption is sought. This purpose need not, necessarily, align with the motivation of the persons installing, acquiring or operating the facilities.[14]

The test cells primarily operate to regulate and reduce air pollutants; for tax-exemption purposes, it does not matter why the test cells were implemented.

The STC and the DEQ additionally argue that the test-cell facilities are not "facilities" under MCL 324.5901 because the test-cell facilities actually create a small amount of pollution through the testing process. This creation of a small amount of pollution does not, however, alter the primary purpose of the test cells, which is to control pollution through prevention. As petitioners point out, many pollution-control machines also create pollution. For example, mechanical balers and compactors, such as those in *Meijer, supra,* release some exhaust during recycling operations.

The STC and the DEQ also argue that the clause "within this state" in MCL 324.5901 bars tax exemption for petitioners because the exhaust emissions that the test cells reduce are released primarily outside Michigan. This argument is unpersuasive. First, the STC and

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[14] *Covert Twp Assessor v State Tax Comm*, 407 Mich 561, 580-581; 287 NW2d 895 (1980).

the DEQ did not preserve this issue for appeal because they did not raise and argue it before the Court of Appeals. Furthermore, the phrase "within this state" modifies the conjoined phrases "to the public health or to property," not "the primary purpose of controlling air pollution." In other words, the statute merely requires that the "primary purpose" of the machinery installed be to "control . . . air pollution," not to specifically control air pollution that would be released primarily within this state, as the STC and the DEQ argue. The statute then refines the category of "air pollution" to refer to a subcategory of pollution "that if released would render the air harmful or inimical to the public health or to property within this state." This phrase indicates that *if* the pollution that has been controlled were to be released, that pollution must be of the type that would be harmful to public health or property in Michigan in order for machinery that controls such air pollution to qualify as a "facility." Thus, if the test cells at issue were installed for the primary purpose of controlling air pollution, and if the release of the controlled air pollution would render the air harmful to public health or property within Michigan, then the test cells qualify as a "facility." Here, the primary purpose of the test cells is to reduce air pollution by testing the emissions released by vehicles. Moreover, there is no question that vehicles and engines manufactured by the petitioners are sold in Michigan, and that the pollution controlled by the test cells is harmful to the public health. It stands to reason then that the vehicles and engines sold in Michigan emit fewer noxious pollutants into Michigan's atmosphere than they would have released without the test cells. Therefore, the test cells control air pollution that, if released, "would render the air harmful or inimical to the public health or to

property within this state." Accordingly, the test cells are "facilities" under MCL 324.5901.[15]

Petitioners' test-cell facilities were installed or acquired for the primary purpose of controlling or disposing of air pollution in Michigan because the test cells curb the spread of air pollution by ensuring that less pollution is released into the atmosphere in the first place; therefore, the test-cell facilities are "facilities" under MCL 324.5901.

The lead opinion argues that the test cells are not "facilities" because their primary purpose is to "*test* engines to ensure that petitioners have properly designed their engines to meet federal regulations so that they can sell them to consumers." *Ante* at 227. However, this argument does not consider that without the federally mandated pollution regulations, petitioners would not need or have test cells, but would continue to operate without them. As petitioners point out, the test cells do not benefit petitioners' businesses because conformance with EPA regulations increases expenses, resulting in higher vehicle and engine prices and reduced sales. Thus, the test cells were not installed to foster sales. Further, *every* business must comply with federal pollution regulations and *every* business is trying to sell something. Under the lead opinion's interpretation, it appears that any business that complies with federal regulations is not entitled to a Michigan tax exemption because it could always be said that the business complied with federal regulations merely to sell its product to consumers. Under the lead opinion's

[15] MCL 324.5901 does not require that pollution be reduced *solely* within Michigan. As long as petitioners sell engines and vehicles in Michigan, thereby reducing harmful pollution in Michigan, the fact that they also sell engines and vehicles in other states, thereby reducing pollution in those states as well, does not prevent them from qualifying for the instant tax exemption.

interpretation, the only way a business would be entitled to a tax exemption is by philanthropically installing pollution-control equipment.

The test cells perform a fundamental function in the air-pollution-control process. They measure the levels of pollution emitted by engines in order to assure compliance with air-pollution regulations. If these levels of pollution exceed limits, the engines are not manufactured or sold, thereby curtailing excessive air pollution. Without the test cells, petitioners would be unable to ensure that their products are less polluting. Because testing emissions is an essential component of "controlling or disposing of air pollution," and because the test cells were installed specifically to test pollution, the test cells can fairly be characterized as having been installed for "the primary purpose of controlling or disposing of air pollution" under MCL 324.5901. Moreover, under the lead opinion's analysis, even compactors or balers, which were specifically held to qualify as "facilities" in *Meijer*, *supra* at 284, a decision with which the lead opinion apparently agrees, *ante* at 233-234, would not qualify as such because their "primary purpose" is to *compress or bale* material, rather than to "control" pollution.

Next, in order to qualify for tax exemptions under part 59, petitioners' test-cell facilities must meet the requirements of MCL 324.5903. First, the test cells must be designed and operated primarily for the control, capture, and removal of pollutants from the air. In this case, the test cells were created for the sole purpose of reducing air pollutants emitted by the petitioners' vehicles and engines, so that is the cells' primary purpose.

As discussed earlier, the test cells control air pollutants directly by regulating the emissions output, and

indirectly by curbing the levels of pollutants released into the air in the first place. The test cells also capture and remove pollutants from the atmosphere. An ordinary meaning of "capture" is "to gain control of or exert influence over."[16] Again, by regulating and curbing emissions, the test cells ensure that pollutants that would otherwise have been released into the atmosphere are never produced in the first place and thus control pollutants. An ordinary meaning of "remove" is "to move or shift from a place or position; to eliminate; do away with or put an end to."[17] The test cells "eliminate" or "put an end to" air pollutants by preventing the pollutants from being created in the first place; were it not for the test cells, the abated pollutants would be in the atmosphere. Thus, the test cells operate primarily for the control, capture, and removal of air pollutants from the air.

Next, the test cells must be suitable and reasonably adequate for the purpose of reducing air pollutants and must also meet the intent and purposes of part 55 of NREPA to qualify for tax exemptions. "The suitability and adequacy . . . can be, and are, measured and tested through non-empirical studies based on accepted scientific principles and sound analysis. . . . [T]he resolution of this question is particularly well-suited to the expertise of the administrative agencies charged with assessing the technical suitability and adequacy of facilities for which exemption is sought."[18] It is undisputed that the test cells function to help petitioners reduce and regulate the air pollutants that their vehicles and engines ultimately emit in order to meet federal stan-

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[16] *Random House Webster's College Dictionary* (1997).

[17] *Id*.

[18] *Covert Twp*, 407 Mich at 582.

dards. As a result, the test cells are suitable and reasonably adequate for the purpose of reducing noxious air pollutants.

The purpose of part 55, by its own terms, is "to provide additional and cumulative remedies to prevent and abate air pollution." The test cells, by ensuring that vehicle and engine emissions are clean enough to pass federal emissions standards, are designed to prevent and abate air pollution. Although the test cells were installed to ensure compliance with federal emissions regulations, they nonetheless accomplish the purpose of part 55—to prevent and abate air pollution. The test cells meet the intent and purposes of part 55 of NREPA because the test cells function to prevent and abate noxious air pollutants.[19]

Petitioners' test-cell facilities qualify for tax exemptions under part 59 because they meet the definition of "facility" in MCL 324.5901 and, under MCL 324.5903, are "designed and operated primarily for the control, capture, and removal of pollutants from the air," are "suitable" or "reasonably adequate" at abating air pollution, and "meet the intent and purposes of part 55."

The lead opinion argues that the test cells do not meet the requirements of MCL 324.5903 because they do not actually remove, control, and capture pollution caused by the operation of petitioners' businesses. *Ante* at 228-229. I disagree. The statute does not require that the exempt equipment itself physically remove air pol-

[19] *Covert Twp* agreed with the STC's holding that the intent and purposes of the predecessor to part 55 " 'are served by pollution control facilities constructed within the State of Michigan whether required by reason of federal or state regulation. . . . It is the fact that pollution control is *provided* that is important and not whether that pollution control is provided in response to state or federal regulation.' " *Id.* at 579 (emphasis in original).

lutants; rather, it merely requires that it be *intended and operated primarily for that purpose*. Moreover, the statute does not require that the pollution removed by the exempt equipment be that *created by the operation of petitioners' businesses*; rather, the statute only refers to air pollution generally, without specifying any particular source of pollution. As explained earlier, the test cells here were intended primarily for, and functioned as, integral parts of a pollution-control process designed to regulate and curb air pollution produced by petitioners' engines and vehicles. Therefore, the test cells were "designed and operated primarily for the control, capture, and removal of pollutants from the air."

The lead opinion also sua sponte injects the argument that in order for a facility to meet the intent and purposes of part 55, it must regulate a "source" of pollution as defined by MCL 324.5501(t). *Ante* at 230. The lead opinion attempts to extrapolate the intent and purposes of "the whole of part 55," *ante* at 230 n 24, by putting together bits and pieces of part 55. This method is flawed. MCL 324.5540 clearly and unambiguously states the purpose of part 55:

> It is the purpose of this part to provide additional and cumulative remedies to prevent and abate air pollution. This part does not abridge or alter rights of action or remedies now or hereafter existing. This part or anything done by virtue of this part shall not be construed as estopping persons from the exercise of their respective rights to suppress nuisances or to prevent or abate air pollution.

We give this language its plain meaning and enforce it as written. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). The title and declared purpose of part 55 refer to air-pollution control generally. The lead opinion wrongly argues that the intent

and purposes of part 55 are not to prevent and abate air pollution generally, but instead to provide remedies in addition to private or citizen suits related to pollution control. Under the lead opinion's faulty interpretation of the intent of part 55, only facilities that provide "additional remedies" would be eligible for a tax exemption under MCL 324.5903. The lead opinion fails to explain how pollution-control facilities other than the test cells can provide "additional remedies" that the test cells cannot.

Moreover, although part 55 mainly deals with stationary sources, this fact is not dispositive because part 55 also refers to nonstationary sources used for transportation.[20] The lead opinion discusses part 55's definition of "source" in a vacuum, while ignoring the other defined terms in part 55. For example, part 55 also governs "process equipment," which it defines as "all equipment, devices, and auxiliary components, *including air pollution control equipment*, stacks, and other emission points, used in a process." MCL 324.5501(q) (emphasis added). Part 55 defines "air pollution control equipment" as "any method, process, or equipment that removes, reduces, or renders less noxious air contaminants discharged into the atmosphere." MCL 324.5501(c). Test cells arguably qualify as "air pollution control equipment" because they ensure that vehicles

[20] See, e.g., MCL 324.5501(b) ("With respect to any mode of transportation, nothing in this part or in the rules promulgated under this part shall be inconsistent with the federal regulations, emission limits . . . ."); MCL 324.5513 ("Notwithstanding any other provision of this part or the rules promulgated under this part, car ferries having the capacity to carry more than 110 motor vehicles and coal-fueled trains used in connection with tourism or an historical museum or carrying works of art or items of historical interest are not subject to regulation under this part."); MCL 324.5512(1) ("The department shall promulgate rules for purposes of doing all of the following: . . . (c) Controlling any mode of transportation that is capable of causing or contributing to air pollution.").

and engines do not exceed federal emissions standards, thus reducing air contaminants discharged into the atmosphere. The important point, however, is that the lead opinion identifies no language from part 55 or elsewhere stating that the "intent and purposes" of part 55 are to regulate pollution exclusively from "sources."

Even if the lead opinion were correct that part 55 exclusively governs "sources," this would not preclude the test cells from meeting the intent and purposes of part 55. The lead opinion neglects to quote the following part of the definition of "source" in part 55: "*A source includes all the processes and process equipment* under common control that are located within a contiguous area, or a smaller group of processes and process equipment as requested by the owner or operator of the source, if in accordance with the clean air act." MCL 324.5501(t) (emphasis added). As discussed earlier, because a test cell qualifies as "air pollution control equipment," it also qualifies as "process equipment," and accordingly as a "source" as defined by part 55.

The lead opinion's argument that part 55 is not intended to reduce motor-vehicle emissions because those emissions are covered by parts 61, 63, and 65 is misplaced. *Ante* at 232. Part 61 is not applicable because it merely prohibits marine vessels from blowing flues under certain conditions. Parts 63 and 65 include procedures for requiring certain motor vehicles in west and southeast Michigan that are more than one year old to be periodically inspected for emissions and obtain a certificate of compliance that would be necessary for registration renewal. Parts 63 and 65 do not include emissions standards for motor-vehicle engines during the design, manufacture, and sale stages, but only ensure that certain vehicles, which satisfy emissions standards when initially purchased, maintain a mini-

mum level of emissions after one year on the road. Further, parts 63 and 65 do not currently even regulate motor-vehicle emissions in west and southeast Michigan because those parts of the state have apparently attained the national ambient air quality standards for ozone. See MCL 324.6306(2); MCL 324.6507(2). In sum, parts 61, 63, and 65 in no way detract from the intent and purposes of part 55, which are to generally prevent and abate air pollution, including by reducing that air pollution from motor-vehicle engines by regulating their design and manufacture before sale.

The lead opinion also ignores the provision that a facility qualifies for a tax exemption only if it "meets the intent and purposes of part 55 *and rules promulgated under that part* . . . ." MCL 324.5903 (emphasis added). Reading the "intent and purposes" language in context with the "rules promulgated" language[21] makes it clear that one of the intents and purposes of part 55 is to reduce pollution from motor vehicles. Part 55 expressly provides that "[t]he department shall promulgate rules for the purpose of doing all of the following: . . . (c) Controlling *any mode of transportation* that is capable of causing or contributing to air pollution." MCL 324.5512(1)(c) (emphasis added). This provision supports the conclusion that the intent of part 55 is not confined to the reduction of pollution from stationary sources. Thus, the test cells both meet the intent and purposes of part 55 and comply with the rules promulgated under part 55 governing pollution created by motor vehicles.

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[21] This Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

Moreover, the lead opinion errs by stating that our interpretation renders part of MCL 324.5903 "nugatory or mere surplusage." *Ante* at 230. MCL 324.5903 requires that the "facility" be "designed and operated primarily for the control, capture, and removal of pollutants from the air, and [be] suitable, reasonably adequate, and meet[] the intent and purposes of part 55," which are "to prevent and abate air pollution," MCL 324.5540. The lead opinion argues that if "the 'intent and purposes' of part 55 are simply the reduction of air pollution, then [the second requirement of MCL 324.5903, that the facility meet this purpose,] adds nothing to the first requirement [of MCL 324.5903, that the facility control, capture, and remove pollutants from the air]." *Ante* at 230 n 23. I respectfully disagree. The second requirement indicates the *purpose* of the "facility," i.e., "to prevent and abate air pollution," while the first requirement describes the *means* by which this purpose is to be achieved, i.e., by "control[ling], captur[ing], and remov[ing] pollutants from the air." Thus, this interpretation does not render any part of this statute "nugatory or mere surplusage."

B. *DETROIT DIESEL'S EQUINOX LINE FACILITY*

I concur with the lead opinion's holding that Detroit Diesel's Equinox Line facility does not qualify for tax exemptions under part 59 because the primary purpose of the Equinox Line is to produce engines, not to control or dispose of air pollution. In order to qualify for the tax exemption, the Equinox Line must meet the definition of "facility" under MCL 324.5901. MCL 324.5901 defines "facility," in pertinent part, as follows:

> [M]achinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or

> disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state. Facility includes an incinerator equipped with a pollution abatement device in effective operation. Facility does not include an air conditioner, dust collector, fan, or other similar facility for the benefit of personnel or of a business. *Facility also means the following*, if the installation was completed on or after July 23, 1965:
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> * * *
>
> (c) A process change involving production equipment made to satisfy the requirements of part 55 and rules promulgated under that part. The maximum cost allowed shall be 25% of the cost of the new process unit but shall not exceed the cost of the conventional control equipment applied on the basis of the new process production rate on the preexisting process. [MCL 324.5901 (emphasis added).]

Thus, under MCL 324.5901, a "facility" may be either "machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state" *or* "[a] process change involving production equipment made to satisfy the requirements of part 55 and rules promulgated under that part."

The Equinox Line does not satisfy the requirements of the tax exemption under MCL 324.5901 for a "facility" because the Equinox Line was not designed for the *primary purpose* of controlling or removing air pollutants. Unlike the test cells, which were installed for the primary and sole purpose of testing and controlling exhaust emissions, the Equinox Line was installed for the primary purpose of manufacturing engines. Although the Equinox Line assists in controlling and

disposing of air pollution by manufacturing less-polluting engines that meet EPA standards, this purpose is secondary. Instead, the primary purpose of the line remains manufacturing engines for sale. Just because a manufacturing facility is altered or built to assure compliance with environmental laws does not mean that its primary purpose of manufacturing is transformed into a new primary purpose of controlling air pollution. The latter purpose remains secondary.[22] Therefore, because, unlike the test cells, the Equinox Line was not installed primarily to control or dispose of air pollution, I concur with the lead opinion's holding that Detroit Diesel's Equinox Line is not a facility under MCL 324.5901. As a result, the Equinox Line does not qualify for tax exemptions under part 59.[23]

Although the lead opinion does not address this argument, Detroit Diesel's argument that the Equinox Line is a "facility" because it is "[a] process[24] change involving production equipment made to satisfy the

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[22] To further illustrate, we offer the following hypothetical situation: if a manufacturing plant builds a new office building for pollution-control engineers charged with controlling and disposing of air pollution released by the plant and its products, the office building would not qualify as a "facility" under MCL 324.5901. That is so because the primary purpose of the office building is to provide offices for employees, not to control or reduce pollution. The fact that the office building provides necessary accommodations for pollution-control engineers, and, therefore, indirectly or secondarily aims at controlling air pollution, does not transform its primary purpose.

[23] Detroit Diesel also is not entitled to a tax exemption because the Equinox Line does not satisfy MCL 324.5903, which mandates that a "facility is designed and operated primarily for the control, capture, and removal of pollutants from the air" in order to qualify for a tax exemption. The Equinox Line was designed for the primary purpose of manufacturing engines for sale, not for the purpose of abating pollution.

[24] Part 55 defines "process" as "an action, operation, or a series of actions or operations at a source that emits or has the potential to emit an air contaminant." MCL 324.5501(p). Part 55 defines "process equip-

requirements of part 55 and rules promulgated under that part" is not valid.[25] The stated purpose of part 55 is to prevent and abate air pollution.[26] Detroit Diesel did not install the Equinox Line specifically to meet the requirements of part 55, but rather installed the Equinox Line to manufacture engines that comply with EPA requirements. That the installation of the Equinox Line furthers the purpose of part 55 does not mean that it was done to satisfy the *requirements* of part 55. As a result, the Equinox Line is not a "facility" under MCL 324.5901 because it is not "[a] process change involving production equipment made to satisfy the requirements of part 55 and rules promulgated under that part."

Detroit Diesel's Equinox Line does not qualify for tax exemptions because the Equinox Line is neither "machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state" nor "[a] process change involving production equipment made to satisfy the requirements of part 55 and rules promulgated under that part." As a result, the Equinox Line is not a facility under MCL 324.5901 and does not qualify for a tax exemption.

IV. DUE PROCESS

I do not find Detroit Diesel's due-process argument persuasive. Detroit Diesel argues that the STC's hear-

ment" as "all equipment, devices, and auxiliary components, including air pollution control equipment, stacks, and other emission points, used in a process." MCL 324.5501(q).

[25] MCL 324.5901(c).

[26] MCL 324.5540.

ing process violated due process because the STC announced at the beginning of the hearing: "It is the position of the State Tax Commission after consultation with legal counsel that it has neither the authority nor the technical expertise to override a determination by the DEQ in regards to whether particular assets qualify for an air pollution control exemption." Detroit Diesel argues that the STC, by abdicating its role as a true decision maker, deprived Detroit Diesel of a meaningful hearing.

> Generally, due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker. Because the collection of a tax constitutes a deprivation of property, a state must provide sufficient procedural safeguards to satisfy due process requirements. But states are afforded great flexibility in satisfying the requirements of due process in the field of taxation. Due process is satisfied when a taxpayer has "a fair opportunity to challenge the accuracy and legal validity of their tax obligation and a clear and certain remedy for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.[27]

Here, part 59 provides that an applicant for a tax exemption is entitled to a hearing:

> Before issuing a certificate, the state tax commission *shall seek approval of the department* and give notice in writing by certified mail to the department of treasury and to the assessor of the taxing unit in which the facility is located or to be located, and shall afford to the applicant and the assessor an opportunity for a hearing.[28]

Under MCL 324.5902(1), a petitioner sends an application for a tax-exemption certificate to the STC. MCL

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[27] *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) (citations and quotation marks omitted).

[28] MCL 324.5902(2) (emphasis added).

324.5902(2) requires the STC to both allow the applicant an opportunity for a hearing and forward the application to the DEQ for approval. If the hearing concludes before the DEQ makes a determination, the STC must then refer the matter to the DEQ for consideration of factual developments at the hearing and to seek approval of the tax certificate. If the hearing concludes after the DEQ makes a determination, as in the instant case, the STC may grant or deny the certificate on the basis of the original DEQ determination and the developments at the hearing, or refer the matter again to the DEQ for consideration of any new information developed at the hearing. The DEQ, not the STC, has the authority and expertise to determine whether the facility is entitled to a tax exemption under part 59.

MCL 324.5903 provides, in pertinent part:

> If the department finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 and rules promulgated under that part, the department shall notify the state tax commission, which *shall issue a certificate*. [Emphasis added.]

MCL 324.5908 provides that although the STC may adopt rules considered necessary for administration of part 59 of NREPA, "[t]hese rules shall not abridge the authority of the department to determine whether or not air pollution control exists within the meaning of this part." Thus, although the STC is the agency that actually issues the tax-exemption certificate, it must defer to the DEQ's determination whether a petitioner is entitled to a tax exemption under part 59.

Further, even assuming that the STC can grant a tax-exemption certificate without the DEQ's approval,

the hearing conducted by the STC in this case complied with due process. As required by MCL 324.5902(2), the STC forwarded Detroit Diesel's application for tax-exemption certificates to the DEQ for approval. After receiving the DEQ's determination that Detroit Diesel was not entitled to the tax exemptions, the STC afforded Detroit Diesel an opportunity for a hearing. The hearing at the STC was not meaningless. The STC gave Detroit Diesel a full hearing in which it was allowed to present evidence and argue that the STC was not bound by the DEQ findings. Detroit Diesel identifies no evidence or legal argument that it was prevented from submitting. Although the STC stated at the outset of the hearing that it lacked the authority to override a DEQ determination regarding an air-pollution-control tax exemption, the STC did not conduct the hearing merely to rubber-stamp the DEQ's earlier decision. Rather, the STC conducted the hearing to gather additional information and forward this information to the DEQ for further consideration and another determination. Unfortunately for Detroit Diesel, the DEQ again decided that Detroit Diesel was not entitled to the tax exemptions. But because the DEQ considered the information developed at the hearing to determine whether to change its determination, the hearing was not meaningless. Thus, Detroit Diesel was afforded due process during the STC proceedings.

V. CONCLUSION

In conclusion, I dissent from the lead opinion and would affirm the Court of Appeals. I would hold that petitioners' test-cell facilities qualify for tax exemptions under part 59 because they meet the definition of "facility" in MCL 324.5901 and, under MCL 324.5903, are "designed and operated primarily for the control,

capture, and removal of pollutants from the air," are "suitable" or "reasonably adequate" at abating air pollution, and "meet the intent and purposes of part 55." I concur with the lead opinion's holding that Detroit Diesel's Equinox Line does not qualify for tax exemptions under part 59 because the Equinox Line is not a "facility" under MCL 324.5901. Lastly, I would hold that Detroit Diesel was not deprived of due process during the STC proceedings.

CORRIGAN and MARKMAN, JJ., concurred with WEAVER, J.

BRACKETT v FOCUS HOPE, INC

Docket No. 135375. Argued May 7, 2008. Decided July 30, 2008.

Patricia D. Brackett sought workers' compensation benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*., for mental disabilities she allegedly suffered as the result of the response by Eleanor Josaitis, the co-founder and chief executive officer of defendant Focus Hope, Inc., to Brackett's violation of a work rule. Brackett had informed her immediate supervisor, David Lepper, that she would not be attending Focus Hope's annual Martin Luther King, Jr., birthday celebration, a mandatory event for Focus Hope employees, because Brackett thought that it was inappropriate to hold the event in Dearborn rather than Detroit, where it had been held in the past. Lepper told Brackett that she would be docked one day's pay as a result. Brackett did not inform Josaitis of her decision before the celebration, nor did she provide an excuse for her absence to the human resources department, as her employer required. After Brackett missed the event, Josaitis docked plaintiff for two days' pay, reduced her job responsibilities, and verbally reprimanded her. Brackett left work and did not return, claiming that she was traumatized by these events. The workers' compensation magistrate found that Brackett's refusal to attend the event was willful, but ruled that Brackett was nevertheless entitled to benefits because she had suffered a mental disability as a result of actual employment events, and further ruled that Brackett's perception of those events was reasonable. The magistrate rejected the defense argument that Brackett's misconduct barred her recovery of benefits under MCL 418.305 and *Daniel v Dep't of Corrections*, 468 Mich 34 (2003). The Workers' Compensation Appellate Commission (WCAC) affirmed, and Focus Hope and its insurer, defendant Accident Fund Insurance Company of America, filed for leave to appeal. The Court of Appeals initially denied leave for lack of merit, but the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted and in light of *Daniel*. 477 Mich 922 (2006). On remand, the Court of Appeals, KELLY, P.J., and METER and GLEICHER, JJ., affirmed, holding that there was ample evidence in the record to support the WCAC's decision. Unpublished opinion per curiam

of the Court of Appeals, issued October 23, 2007 (Docket No. 274078). The defendants sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 480 Mich 1147 (2008).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR and Justices YOUNG and MARKMAN, the Supreme Court *held*:

The plaintiff is not entitled to workers' compensation benefits because her injury arose out of her refusal to attend an employer-mandated event, which constitutes intentional and willful misconduct.

1. Conduct is "intentional and wilful misconduct" under MCL 418.305 if it is improper and done on purpose despite the knowledge that it is against the rules.

2. The text of MCL 418.305 does not create a sliding scale of moral turpitude that tribunals may assess in deciding whether to apply the statutory exclusion. Rather, the statute simply excludes benefits where the injuries arose by reason of the employee's intentional and willful misconduct.

Reversed.

Justice WEAVER, joined by Justices CAVANAGH and KELLY, dissenting, would affirm the decisions of the workers' compensation magistrate, the WCAC, and the Court of Appeals because the misconduct at issue here was not equivalent to the sexual harassment in *Daniel*, and would have granted leave to appeal before ruling on this important question.

WORKERS' COMPENSATION — INTENTIONAL AND WILLFUL MISCONDUCT OF EMPLOYEES.

The statutory provision prohibiting an employee from receiving workers' compensation for an injury caused by the employee's intentional and willful misconduct applies to conduct that is improper and done purposely despite the knowledge that it is against the rules, regardless of the degree of moral turpitude associated with the misconduct (MCL 418.305).

Charters, Heck, O'Donnell & Petrulis, P.C. (by *Margaret A. O'Donnell*), for the plaintiff.

Lacey & Jones (by *Gerald M. Marcinkoski*) for the defendants.

Amicus Curiae:

Daryl Royal for the Michigan Association for Justice.

CORRIGAN, J. This case requires us to consider whether plaintiff's refusal to attend an employer-mandated event constituted "intentional and wilful misconduct" under MCL 418.305, thereby barring her recovery of benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*. The magistrate found that plaintiff willfully refused to attend the event, despite having been informed that the event was essential in promoting the employer's goal of racial reconciliation. In light of that finding, we conclude that plaintiff's refusal to attend the mandatory event constituted intentional and willful misconduct, thereby barring workers' compensation benefits under MCL 418.305. We thus reverse the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

Defendant Focus Hope, Inc., hired plaintiff as a full-time employee in January 2001. Defendant's cofounder and chief executive officer, Eleanor Josaitis, told plaintiff that the mission of Focus Hope is to seek racial equality and reconciliation. Josaitis further explained that the most important function of the year is the Martin Luther King, Jr., birthday celebration, and that each employee was expected to attend the event. If the employee had a legitimate excuse for not attending, the employee was to inform the human resources department.

The King Day event was ordinarily held in Detroit, but in 2002, Josaitis decided to hold it in Dearborn. Plaintiff told her immediate supervisor, David Lepper, that she would not attend the event in Dearborn because she and her family had bad experiences there as African-Americans and because she believed the history of race relations in Dearborn was not in keeping with Dr. King's aspirations. Lepper advised plaintiff that she

would be docked one day's pay for refusing to attend. Plaintiff did not tell Josaitis or the human resources department of her decision not to attend.

After the King Day event, Josaitis met with plaintiff, Lepper, and a human resources manager. Josaitis asked plaintiff why she had not attended the King Day celebration. Plaintiff explained that she believed the site of the event in Dearborn was not appropriate. Josaitis responded that plaintiff had been informed when she was hired that attendance at the King Day event was mandatory, and that the purpose of Focus Hope was to promote acceptance and tolerance. Josaitis advised plaintiff that she would be docked for two days' pay. Subsequently, some of plaintiff's job responsibilities were taken away.

Plaintiff and Josaitis then exchanged memos explaining their respective positions. Josaitis wrote in her memo that plaintiff's failure to attend the King Day event had reduced her confidence in plaintiff's commitment to Focus Hope's goals. Josaitis explained:

> The purpose of the Civil Rights movement was to change the negative perception and prejudice of any individual towards another, based on race, gender, religion, color, or creed through the use of non-violent action. Father [William] Cunningham and I started Focus: HOPE based on this same philosophy that Dr. King gave his life for. Just as I stated to you in your orientation, I expect Every Focus: HOPE Colleague to abide by these same principles.
>
> To harbor such feelings of the past without thinking how our MLK mandatory staff development day helps to move Focus: HOPE into the future, reduces my confidence in your commitment to help us fulfill our mission statement.

In her memo, plaintiff admitted that she understood that attendance at the King Day event was mandatory, but stated that she "felt offended by the celebration

being in a city that I do not frequent and that I would be extremely uncomfortable celebrating Martin Luther King's birthday [in]." She added, "I did not attend the celebration and expressed [in the meeting] that I spent it with my family and with no regrets accepting the day off with no pay!" Plaintiff then wrote, "I do not accept [Josaitis's] judging and wrongfully degrading my character as a [sic] 'untrustworthy person.' "

Plaintiff claims that a second meeting occurred in which Josaitis allegedly reiterated her disappointment in plaintiff, shook her finger in plaintiff's face, and said that plaintiff did not deserve to receive a paycheck from Focus Hope. When plaintiff asked if she was being fired, Josaitis shrugged her shoulders and let her out of the office. Josaitis testified that she remained calm and that she did not yell or threaten to fire her.

Plaintiff claimed that Josaitis's alleged comments traumatized her. Plaintiff left work and never returned. Her psychologist opined that plaintiff suffered a major depression precipitated by work events and that she is unable to work. A defense psychiatrist found no evidence of a continuing mental disability and opined that plaintiff could return to work without restrictions.

The workers' compensation magistrate credited the testimony of plaintiff and her psychologist. The magistrate found that plaintiff's mental disability arose from actual employment events and that plaintiff's perception of those events was reasonable.[1] Although the magistrate found that plaintiff had willfully refused to attend the King Day event, and that her disability had resulted from that willful refusal, the magistrate none-

[1] The magistrate reached this conclusion in spite of his "personal" view that "the reaction of Ms. Brackett to these events and her reasonable perceptions thereof (i.e., experiencing a major depressive episode causing disability for more than two years) is excessive bordering on outlandish."

theless rejected the defense argument that plaintiff's misconduct barred her recovery of benefits under MCL 418.305. The magistrate stated that "[t]he kind of 'misconduct' plaintiff engaged in here is a far cry from the alleged misconduct [i.e., sexual harassment] alleged in *Daniel* [*v Dep't of Corrections*, 468 Mich 34; 658 NW2d 144 (2003)], and for that reason I decline to follow" *Daniel*.

The Workers' Compensation Appellate Commission (WCAC) affirmed. It chastised defendant as "insensitive" for failing to recognize that plaintiff's agreement to attend King Day celebrations would not require her to attend such events in Dearborn. Thus, the WCAC found "absolutely no merit to defendants' claim that plaintiff's behavior should disqualify her for benefits pursuant to the doctrine set forth in" *Daniel*.

The Court of Appeals denied leave to appeal for lack of merit,[2] but this Court remanded the case to the Court of Appeals for consideration as on leave granted, in light of *Daniel*.[3] On remand, the Court of Appeals affirmed the WCAC decision.[4] The Court of Appeals determined that sufficient evidence supported the finding that plaintiff's conduct was a "far cry" from the misconduct in *Daniel*. Citing *Andrews v Gen Motors Corp*, 98 Mich App 556; 298 NW2d 309 (1980), the Court of Appeals concluded that plaintiff's conduct fell within the realm "in which a claimant perhaps violates a workplace rule or expectation but is not precluded by § 305 from recovering benefits for a resulting injury."[5]

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[2] Unpublished order of the Court of Appeals, entered April 28, 2006 (Docket No. 266018).

[3] 477 Mich 922 (2006).

[4] Unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 274078).

[5] *Id*. at 2.

Defendants again applied for leave to appeal to this Court. We scheduled the case for oral argument on the application, directing the parties to address "whether plaintiff's injury resulted from her willful misconduct."[6]

II. STANDARD OF REVIEW

In the absence of fraud, this Court must consider the WCAC's findings of fact conclusive if any competent evidence in the record supports them. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698; 614 NW2d 607 (2000). We review de novo questions of law, including statutory interpretation. *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 32; 732 NW2d 56 (2007); *Daniel*, *supra* at 40.

III. ANALYSIS

MCL 418.305 provides: "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." "This provision has remained essentially unchanged since it was first adopted by the Legislature in 1912 as part of the original workers' compensation legislation. See 1912 (1st Ex Sess) PA 10, part 2, § 2." *Daniel*, *supra* at 41. The question here is whether plaintiff's refusal to attend an employer-mandated event, a refusal that the magistrate specifically found to be "willful," constitutes "intentional and wilful misconduct" that bars recovery of workers' compensation benefits.

Our fundamental obligation when interpreting a statute is to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304,

[6] 480 Mich 1147-1148 (2008).

312; 645 NW2d 34 (2002). An undefined statutory term must be accorded its plain and ordinary meaning. MCL 8.3a; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning. *Id*. at 151-152. A legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning. MCL 8.3a; *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 7; 704 NW2d 69 (2005). In this case, we need not determine whether the statutory phrase "intentional and wilful misconduct" is a common phrase or a legal term of art because the terms in the phrase are similarly defined in both a lay dictionary and a legal dictionary.

"Intentional" is defined as "done with intention or on purpose." *Random House Webster's College Dictionary* (1991). "Willful" is defined as "deliberate, voluntary, or intentional." *Id*. "Willful implies opposition to those whose wishes, suggestions, or commands ought to be respected or obeyed: a willful son who ignored his parents' advice." *Id*. " ' "[W]illful" means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, "regardless of venial motive." ' " *People v Hegedus*, 432 Mich 598, 605 n 7; 443 NW2d 127 (1989) (citations omitted). "Misconduct" is defined as "improper behavior." *Random House Webster's College Dictionary* (1991). Therefore, conduct is "intentional and wilful misconduct" if it is "improper" and done "on purpose" despite the knowledge that it is against the rules.

Likewise, Black's Law Dictionary (7th ed) defines "intentional" as "[d]one with the aim of carrying out the act," and it defines "willful misconduct of em-

ployee" as "[t]he deliberate disregard by an employee of the employer's interests, including its work rules and standards of conduct, justifying a denial of unemployment compensation if the employee is terminated for the misconduct."

And, indeed, in the past, our Court has approached the definition of "willful misconduct" with this understanding. In *Detwiler v Consumers Power Co*, 252 Mich 79; 233 NW 350 (1930), this Court defined "willful misconduct" as an employee's "obstinate or perverse opposition to the will of the employer."

In *Detwiler*, the plaintiff's husband was killed in a freight elevator accident at work. Another employee had "cautioned" the decedent against using the elevator because it was dangerous, but the employer had no rule barring its use. This Court rejected the employer's argument that the decedent's use of the elevator constituted intentional and willful misconduct:

> Assuming, but not deciding, that wilful misconduct might consist in wilful violation of a rule made for the employee's own safety or the safety of others, the record shows no such rule. A rule, to be effective as such, must be prescribed by a power having authority to make rules and it must be enforced with diligence.
>
> If it be conceded, for sake of argument, that the instruction or caution here was duly authorized, as contended by the employer, still it appears that it was not enforced, obedience was not required, and it is unavailing in respect of wilful misconduct. It was well said in *Haffemayer* v. *United Keanograph Film Co.*, 1 Cal. Ind. Acc. Comm. Dec. (No. 24, 1915) 58, as reported in 8 N.C.C.A. 891:
>
> "To disregard the instructions of an employer, where such instructions are given merely in the form of cautions, and where repeated violations of such instructions are known and permitted without penalty and without positive insistence upon obedience, does not constitute such *obstinate or perverse opposition to the will of the employer as amounts to wilful misconduct*. To hold otherwise would be

> *to open the door for employers to impose numbers of safety rules upon their employees with a tacit understanding that such rules need not, so far as the employers were concerned, be regarded if the employees chose to do otherwise, but that if an employee was injured while disobeying any such instructions he should be deprived of compensation. An employer can not be allowed to impose two standards of care upon his employees, one for the ordinary conduct of his business and the other as a test of liability under the workmen's compensation * * * act in case of accident." [Id. at 81-82 (emphasis added).]*

The *Detwiler* Court's adoption of the "obstinate and perverse opposition to the will of the employer" definition is useful in according meaning to the entire statutory phrase "intentional and wilful misconduct." Under this standard, § 305 bars an employee from recovering benefits for misconduct that is both (1) intentional, i.e., deliberate or nonaccidental, and (2) willful, i.e., obstinately or perversely opposed to the employer's will. An employer's work rule must be clearly established and consistently enforced in order for the employee to understand the mandatory nature of the rule and for its violation to constitute intentional and willful misconduct. *Detwiler*, *supra* at 81-82.

The *Detwiler* analysis is consistent with our recent decision in *Daniel*. In *Daniel*, the Department of Corrections suspended the plaintiff, a probation officer, for sexually harassing female attorneys. After returning to work, the plaintiff suffered a mental disability because he felt harassed by his supervisor and the female attorneys. This Court concluded that the plaintiff was injured by reason of his intentional and willful misconduct. *Daniel*, *supra* at 44. Further, this Court rejected the Court of Appeals majority's conclusion that the misconduct did not rise to a sufficient level of moral turpitude to be " 'intentional and wilful.' " *Id*. at 45.

Similarly, the facts found by the magistrate and the WCAC in this case establish that plaintiff's refusal to

attend the King Day event constituted intentional and willful misconduct. Attending this event was a mandatory requirement for Focus Hope employees. Josaitis personally interviews every prospective employee and impresses on them the necessity to attend the King Day event. The magistrate specifically found that plaintiff's refusal to attend the event was willful. Plaintiff did not challenge this finding, and the WCAC did not disturb it. This finding is supported by evidence in the record. Therefore, we must treat as conclusive the WCAC's finding that plaintiff's refusal to attend was willful. *Mudel*, *supra*. Plaintiff's deliberate and categorical refusal to attend this mandatory function constituted insubordination.

In concluding that plaintiff's misconduct was not excluded by MCL 418.305, the Court of Appeals agreed with the WCAC that, unlike the sexual harassment in *Daniel*, plaintiff's conduct perhaps violated a workplace rule but was insufficiently serious to preclude benefits under § 305. The Court of Appeals cited *Andrews*, in which the Court of Appeals stated that misconduct must involve some unspecified degree of "moral turpitude" in order to bar recovery. The *Andrews* Court relied on *Crilly v Ballou*, 353 Mich 303, 327; 91 NW2d 493 (1958), in which this Court asserted in dictum that the statute excluded from coverage "acts of a degree of moral turpitude," equating intentional and willful misconduct with acts of a "gross and reprehensible nature."

The dictum in *Crilly* essentially engrafts a "moral turpitude" requirement onto § 305. The dictum is thus inconsistent with the plain statutory language, *Detwiler*, and *Daniel*. The text of § 305 does not create a sliding scale of "moral turpitude" that tribunals may assess in deciding whether to apply the statutory exclu-

sion. Rather, the statute simply excludes benefits where the injuries arose by reason of the employee's intentional and willful misconduct. Moreover, this Court in *Daniel* rejected the Court of Appeals majority's conclusion in that case that the misconduct did not rise to a level of moral turpitude that was intentional and willful. We held that the plaintiff's repeated acts of sexual harassment were voluntary and went beyond negligence or gross negligence.

The same analysis applies here. Plaintiff willfully refused to attend her employer's most important function. She did so in the face of an express requirement that she attend, and did so even though the location of the event was an essential part of her employer's overall mission. Plaintiff's refusal to follow her employer's clearly expressed rule constituted an "obstinate or perverse opposition to the will of the employer." She was disciplined for this misconduct. As in *Daniel*, it is undisputed that her mental disability flows directly from the employer-imposed discipline for misconduct.

IV. RESPONSE TO THE DISSENT

The dissent contends that plaintiff was "selectively singled out for harsh punishment" because approximately 50-60 other employees allegedly refused to attend the event in Dearborn. But neither the magistrate nor the WCAC found that plaintiff was singled out for punishment, and the record does not support such a finding. Plaintiff presented no evidence other than her own vague, contradictory, and—by her own admission—speculative testimony to suggest that other employees refused to attend the event but were not punished.

Plaintiff initially testified that "50 to 60" of her colleagues "had adverse opinions about that particular site." She later claimed that "there was like 80 people.

[Eighty to ninety] people or something that didn't attend. I forgot the people — the numbers, but there was more than myself — then I was called by Human Resources." Still later, on cross-examination, plaintiff contended that she "was the only person out of 80" to be questioned about her failure to attend, then added, "I think there was two of us." When asked how she knew this, plaintiff responded, "I guess it's speculation." Plaintiff did not present testimony from or even identify any of the other employees who allegedly refused to attend.

Even if plaintiff had shown that other employees did not attend the event, she offered no proof that any such employees failed to provide a legitimate excuse to the human resources department before the event, as defendant required, and that those employees then went unpunished despite their disobedience. Thus, the dissent's assertion that plaintiff was "singled out for harsh punishment" is wholly unsupported in the record.

Next, the dissent contends that "the 'harm' that Ms. Brackett suffered was not caused by the initial response by her supervisor, but by the director's harsh personal censure of Ms. Brackett." *Post* at 288. This hyperbolic criticism of Ms. Josaitis has no basis in the record or in the findings of the magistrate and the WCAC. The lower tribunals simply did not find that Josaitis engaged in a "harsh personal censure." It is most regrettable that our dissenting colleagues have chosen to lob these unfounded accusations.

Moreover, the dissent's unfounded accusations do not reflect plaintiff's documented, ongoing insubordination in which she continued to oppose the mandatory attendance at the King Day event. In her memo to Josaitis following the initial meeting, plaintiff expressed no remorse. On the contrary, plaintiff continued to insist

that she should not be required to attend the event in Dearborn because she "felt offended by the celebration being in a city that I do not frequent" and in which she "would be extremely uncomfortable celebrating Martin Luther King's birthday." Plaintiff admitted that she had "no regrets accepting the day off with no pay!" And referring to Josaitis, plaintiff stated, "I do not accept her judging and wrongfully degrading my character as a [sic] 'untrustworthy person.' " The dissent's excessive criticism of Josaitis thus appears quite shortsighted where plaintiff (1) violated Focus Hope's rule by refusing to join the King Day celebration, (2) admitted her knowledge that attendance was mandatory, and (3) continued to express her lack of remorse for skipping the event.

And as the dissenting justices invent unfounded criticisms of the cofounder of Focus Hope, they fail to give effect to the magistrate's findings that plaintiff "actually did willfully not attend the Defendant's M L King Day Celebration" and that "[s]he actually did suffer disciplinary action *on account thereof*." (Emphasis added.) The dissent's effort to disconnect plaintiff's misconduct from her resulting disability is therefore unavailing and contrary to the magistrate's own findings.

Next, the dissent endorses the Court of Appeals assertion that plaintiff's "pre-arranged non-attendance" was not misconduct. *Post* at 290. But Focus Hope required employees to provide a legitimate excuse to the human resources department, and it is undisputed that plaintiff did not inform the department of her absence before the event. Although plaintiff did inform Lepper, her immediate supervisor, of her decision not to attend, plaintiff knew that she was violating a rule because Lepper told her that she would be docked

a day's pay. The dissent does not explain how plaintiff's acceptance of a penalty for violating the rule excuses or negates her violation of the rule, nor does the dissent explain how the fact that plaintiff was ultimately docked for two days' pay rather than one negates the existence of the rule. The rule existed and was violated regardless whether plaintiff was docked for one day or two days.

It is important to recall that plaintiff was not fired for her refusal to attend the King Day event. Rather, plaintiff claims that she remains indefinitely unable to work because of a major depressive episode arising from the events surrounding her punishment, including having her pay docked for two days instead of one. We note that the magistrate himself found plaintiff's alleged reaction to these events to be "excessive bordering on outlandish."

The dissent accuses the majority of concluding that plaintiff's misconduct in this case was "equivalent" to the misconduct that occurred in *Daniel*. *Post* at 286, 289. But we have expressed no such view. A claimant's misconduct does not have to be "equivalent" to the misconduct that occurred in *Daniel* in order to bar the plaintiff from recovering workers' compensation benefits. Rather, under MCL 418.305, the plaintiff is barred from recovering benefits if the misconduct was "intentional and wilful." The statute does not require equivalence to the misconduct in *Daniel*.

The dissent states that we have "nonsensically" concluded that an employee's intentional and willful misconduct bars workers' compensation benefits "regardless of whether the rule is controversial and whether it is properly and uniformly enforced." *Post* at 291. As we have explained above, however, there is no evidence that Focus Hope did not properly or uniformly

enforce its rule. Other than her own admitted speculation, plaintiff presented no evidence that other employees failed to attend the event, failed to inform the human resources department, and then went unpunished for their misconduct.

Moreover, MCL 418.305 contains no exception that would allow employees to intentionally and willfully violate employer rules that a workers' compensation tribunal or appellate court later deems "controversial." The dissent has invented this exception out of whole cloth. It is not clear on what authority the dissent would permit tribunals or courts to find that an employer's rule is "controversial" and to then disregard the plain language of MCL 418.305 on the basis of that finding. Nor is it clear whether or how the dissent believes that a tribunal or court would possess the institutional capacity to decide on a principled basis what is or is not "controversial." And even if the Legislature had adopted a "controversial" rule exception in MCL 418.305, the dissenting justices do not explain why they find it "controversial" to celebrate Dr. King's birthday in a way that promotes Focus Hope's goal of racial reconciliation.

Finally, the dissent fundamentally distorts the nature of Focus Hope's rule by questioning whether "there was a well-established work rule to hold the event in Dearborn, as opposed to Detroit." *Post* at 288. But plaintiff concedes that when she was hired, she was told by Josaitis that all employees were expected to attend the King Day celebration, and that this celebration was the most important event of the year for Focus Hope. Plaintiff accepted her position with full knowledge that she was required to attend the event. In 2002, Josaitis held the event in Dearborn to further Focus Hope's goals of racial reconciliation and healing past

wounds. During her testimony, Josaitis quoted the Focus Hope mission statement, which provides:

> Recognizing the dignity and beauty of every person, we pledge intelligent and practical action to overcome racism, poverty and injustice. And to build a metropolitan community where all people may live in freedom, harmony, trust and affection. Black and white, yellow, brown and red from Detroit and its suburbs of every economic status, national origin and religious persuasion we join in this covenant.

Josaitis testified that "every single person that comes to Focus Hope, the first question that they're asked is do you have any philosophical difference with that mission statement. That mission statement is on the back of all of our business cards, it hangs on every wall."

Josaitis testified that the mission statement fit into the King Day celebration because "Martin Luther King was a man that was trying to build bridges. . . . So, on Dr. King day we always came together to talk about the history of civil rights and where we were going into the future." She further explained that "*every single* person that comes to work for Focus Hope goes through a two-hour orientation with me and then they go through an orientation with the Human Resources Department and every single person is told that it is mandatory and why it is so important." (Emphasis in original.) It is undisputed that plaintiff went through this orientation.

Focus Hope's mission statement articulates goals and ideals that are not limited to the geographical boundaries of one city. Indeed, the mission statement expressly refers to "Detroit *and its suburbs*" and to the "*metropolitan community*." (Emphasis added.) Plaintiff had full notice of the mission statement when she agreed to work for Focus Hope, and the 2002 celebration was held in Dearborn to advance those goals.

Therefore, the dissent's effort to confine Focus Hope's celebration of Dr. King's birth to a Detroit-only venue is wholly unconvincing.

V. CONCLUSION

For these reasons, we hold that plaintiff's injury arose out of her intentional and willful misconduct in refusing to attend an employer-mandated event. We reaffirm the holding in *Daniel* and reject the insertion of a "moral turpitude" requirement into the text of MCL 418.305. Accordingly, the judgment of the Court of Appeals is reversed.

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

WEAVER, J. (*dissenting*). I dissent from the decision of the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) to reverse the judgment of the Court of Appeals on the ground that the plaintiff's refusal to attend a mandatory employee event constituted "intentional and wilful misconduct" under MCL 418.305, thereby barring her recovery of benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*.

The majority of four, in reversing the decisions reached by the magistrate, the Workers' Compensation Appellate Commission (WCAC), and the Court of Appeals, has supplanted the very well-reasoned findings reached by the aforementioned entities with its own nonsensical conclusion that the "intentional and wilful misconduct" engaged in by the plaintiff in this case was equivalent to the "intentional and wilful misconduct" that occurred in *Daniel v Dep't of Corrections,* 468 Mich 34; 658 NW2d 144 (2003). Having authored *Daniel,* I

take issue with the majority's unfounded conclusion and instead agree that the "plaintiff's decision to not attend the Martin Luther King celebration in Dearborn . . . was 'a *far cry*' from the probation officer's sexual harassment in *Daniels* [sic]."[1] Consequently, I agree with the decision reached by the Court of Appeals affirming the magistrate and WCAC's award of benefits to the plaintiff.

A brief recitation of the facts illustrates the distinction between the employee misconduct that occurred in *Daniel*[2] and the employee action that occurred here. The plaintiff, Patricia D. Brackett, worked for defendant Focus Hope in Detroit. Focus Hope's mission statement emphasizes the importance of following the teachings of Martin Luther King, Jr. During her hiring interview, Ms. Brackett was advised that she would be required to attend a Focus Hope event on Martin Luther King, Jr., Day. Because the Martin Luther King Day celebrations had always been held in Detroit, Ms. Brackett had no reason to believe at the time she was hired that she would be required to attend the event in the city of Dearborn. However, in 2002, the year that Ms. Brackett was employed by Focus Hope, the director, Eleanor Josaitis, decided to hold the event not in Detroit, but in Dearborn, in an effort to promote Focus Hope's goal of racial reconciliation. Ms. Brackett testified that the decision was a topic of open discussion among Focus Hope employees. Approximately 50 to 60

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[1] *Brackett v Focus Hope, Inc,* unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 274078) (emphasis added).

[2] The claimant in *Daniel* was a male probation officer employed by the Michigan Department of Corrections. The basis for denying workers' compensation benefits to the claimant in *Daniel* was the probation officer's blatant and repeated sexual harassment of several female defense attorneys.

Focus Hope employees, including Ms. Brackett, who is African-American, believed the event should not be held in Dearborn.

Speaking personally about her objections to holding the event in Dearborn, Ms. Brackett testified that she voiced her concerns to her immediate supervisor given her own family's past experience in the community. Indeed, evidently the Focus Hope director's desire to hold the event in Dearborn, instead of Detroit, was based in part on her decision to expand the scope of Focus Hope's policy by carrying Focus Hope's message into a new realm, an area that Ms. Brackett testified was "not a good fit" for her.

While the majority equates the "misconduct" that occurred here with the sexual harassment misconduct that occurred in *Daniel,* it is not even clear that there was a well-established work rule to hold the event in Dearborn, as opposed to Detroit. Therefore, it cannot be said that Ms. Brackett violated a well-established work rule.

Moreover, the "harm" that Ms. Brackett suffered in this case was not caused by the initial response by her supervisor, but by the director's harsh personal censure of Ms. Brackett. Specifically, Ms. Brackett notified her immediate supervisor that she objected to attending the event in Dearborn and her supervisor told her she would be docked one day's pay for her refusal to attend. Ms. Brackett accepted this reprimand. It was not until after the Dearborn event that Ms. Josaitis harshly censured Ms. Brackett for refusing to attend. Ms. Brackett asserts that Ms. Josaitis and she had a "one-on-one" meeting, during which time the director told Ms. Brackett she was disappointed by Ms. Brackett's lack of loyalty and that she had lost faith in her as a Focus Hope employee.

In addition, instead of docking Ms. Brackett's pay for only one day, which was the accepted punishment dictated by Ms. Brackett's supervisor, the director informed Ms. Brackett that she would be docked two days' pay. During this meeting, Ms. Brackett further alleges that Ms. Josaitis shook her finger in Ms. Brackett's face and told her that she did not deserve a check from Focus Hope. When Ms. Brackett then asked if she was being fired, Ms. Josaitis simply shrugged her shoulders and left the room.

As a result of this confrontation, Ms. Brackett left the job that day and has not returned since. She was deeply upset by the incident and a psychiatrist diagnosed her as suffering from disabling depression as a result of the harsh reprimand by the director.

Given the fact that Ms. Brackett testified that 50 to 60 other Focus Hope employees did not attend the Martin Luther King Day celebration in Dearborn, and there was no evidence that these employees were also singled out and reprimanded in the same harsh manner as Ms. Brackett, it is questionable whether *Daniel* even applies. *Daniel* states that "MCL 418.305 does not operate to preclude benefits where an employee was injured while violating a work rule that had not been enforced by the employer." *Id*. at 46-47. Because it appears that Ms. Brackett was selectively singled out for harsh punishment, it is questionable whether this work rule was strictly enforced across the board.

All the lower tribunals that dealt with this case declined to deem Ms. Brackett's decision not to attend the celebration in Dearborn as "misconduct." Although the magistrate found that Ms. Brackett "actually did willfully not attend the defendant's M L King Day celebration," he made that determination in the context of discussing Ms. Brackett's perceptions of workplace

events. In deciding whether Ms. Brackett should be denied benefits under MCL 418.305, the magistrate used the word "misconduct" in quotation marks and refused to follow *Daniel*, ruling that the conduct at issue in this case was "a far cry" from that in *Daniel*. The WCAC specifically stated that to call Ms. Brackett's actions "misconduct" was "clearly unreasonable" because she should not have been expected to attend the celebration in Dearborn. The Court of Appeals agreed that Ms. Brackett's "pre-arranged non-attendance" was not misconduct. *Brackett*, *supra* at 2.

Additionally, the magistrate found that Ms. Josaitis's reaction amounted to a "chastisement" of Ms. Brackett, whom she accused of having "broken trust" with the organization and with Ms. Josaitis herself. Neither the open discussions among the employees of Focus Hope about the propriety of holding the celebration in Dearborn nor Ms. Brackett's discussion with her supervisor about the one-day-pay sanction had prepared Ms. Brackett for Ms. Josaitis' severe criticism and loss of trust in her, which accompanied the decision to dock her two days' pay. Notably, the magistrate did not find that Ms. Brackett was injured by Ms. Josaitis's enforcement of the rule through the increased pay sanction. Rather, he found that she was injured by Ms. Josaitis's expressed personal disappointment, lack of trust, and loss of confidence in Ms. Brackett. Thus, it is questionable whether Ms. Brackett's mental injury resulted from the proper enforcement of a workplace rule.

Given the evidence tending to show that Ms. Brackett was singled out for harsh criticism, and the fact that her "misconduct" here does not equate to the "intentional and wilful" sexual harassment that occurred in *Daniel,* I dissent from the majority of four's decision to reverse and thereby deprive Ms. Brackett of disability

benefits. The magistrate, the WCAC, and the Court of Appeals all concluded that the rule in *Daniel* should not be extended to this case. The majority of four instead nonsensically concludes that an employee's decision not to follow a work rule amounts to so-called "intentional and wilful misconduct" and precludes workers' compensation benefits regardless of whether the rule is controversial and whether it is properly and uniformly enforced. Consequently, I agree with the decision reached by the Court of Appeals affirming the magistrate and WCAC's award of benefits to the plaintiff.

As a final point, I note that given the vastly divergent factual scenarios presented in this case and in *Daniel,* the majority of four should, at the very least, have granted the application for leave to appeal in order that the parties and the Court would have the benefit of full briefing and argument on this important question.

CAVANAGH and KELLY, JJ., concurred with WEAVER, J.

PEOPLE v SMITH

Docket No. 134682. Decided July 31, 2008.

A Wayne Circuit Court jury convicted Gary T. Smith of three counts of first-degree criminal sexual conduct for the sexual abuse of a nine-year-old girl. For a person with the defendant's offense variable (OV) level and prior record variable (PRV) level, the sentencing guidelines recommend a minimum sentence in the range of 9 to 15 years in prison. The court, Timothy M. Kenny, J., sentenced the defendant to three concurrent terms of 30 to 50 years. As reasons for its departure from the recommended minimum sentence range, the court cited (1) the fact that the defendant had served as a parental role model and a child-care provider for the victim, (2) the 15-month period over which the abuse had occurred, (3) the defendant's threat to evict the victim and her family from his home if she told anyone about the abuse, which would have left the family homeless, and (4) the gynecological examination that the victim had to undergo. The Court of Appeals, SMOLENSKI, P.J., and WILDER and ZAHRA, JJ., affirmed the defendant's convictions and sentences in an unpublished opinion per curiam, issued July 19, 2007 (Docket No. 267099). The defendant sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 480 Mich 1014 (2008).

In an opinion by Justice KELLY, joined by Chief Justice TAYLOR and Justices CAVANAGH, YOUNG, and MARKMAN, the Supreme Court *held*:

The trial court articulated some legitimate reasons for a departure, but failed to justify the severity of the sentences imposed in this case. The trial court abused its discretion by not establishing why the sentences imposed were proportionate to the offense and the offender.

1. A trial court must articulate the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure, nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the court articulated.

2. The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply any departure it might have made.

3. The trial court's articulation of reasons for the departure must be sufficient to allow adequate appellate review.

4. The minimum sentence imposed must be proportionate; that is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.

5. When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, the trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.

6. The trial court may justify the proportionality of a departure by anchoring it in the sentencing guidelines, comparing the specific facts of a defendant's case against the sentences recommended in the sentencing grid for other offenders who committed the same crime. The court should explain why the substantial and compelling reasons supporting the departure are similar to the characteristics or conduct that would produce a minimum sentence for another offender that is within the guidelines range for that offender and that is of the same length as the sentence imposed on the defendant following the departure.

7. While departures from the guidelines recommendation cannot be assessed with mathematical precision, the trial court must comply reasonably with its obligations under the guidelines in order to further the legislative goal of sentencing uniformity.

8. The trial court in this case did not abuse its discretion by concluding that the long period of abuse and the defendant's threat to retaliate by evicting the victim and her family were substantial and compelling reasons justifying a departure. While a gynecological examination is a commonplace repercussion of criminal sexual conduct and would not generally represent such a wide deviation from the norm that a court could premise a departure on it, under the unique circumstances of this case, the trial did not abuse its discretion by concluding that the examination provided a substantial and compelling reason for a departure.

9. The trial court, however, gave no explanation for the extent of the departure independent of the reasons it gave to depart; thus, the court offered no justification to support the large departure in this case and failed to justify why the departure was a proportionate one.

Justice MARKMAN, concurring, wrote separately to make two points. First, the propositions in Justice CORRIGAN's dissent, if accepted, would permit a sentencing court to impose a departure

sentence without justifying the particular departure imposed, thereby shielding such decisions from meaningful appellate review and undermining the overall purpose of the sentencing guidelines of securing uniform and proportionate sentences. Second, Justice MARKMAN would emphasize that the majority does not assert that analogizing to the sentencing grid constitutes the exclusive means by which a court may justify a particular departure; another obvious possibility would be to compare a sentence to others imposed in reasonably similar cases. This method would allow a sentencing court to place a particular case upon a continuum of similar cases, in order to fashion a uniform and proportionate sentence.

Sentences vacated; case remanded for resentencing.

Justice WEAVER, dissenting, would affirm the judgment of the Court of Appeals for the reasons stated in that court's opinion. In affirming the trial court, the Court of Appeals concluded that the reasons given for the departure were objective and verifiable, that the trial court did not abuse its discretion in determining that those reasons were substantial and compelling, and that the sentences imposed were proportionate to the seriousness of the crimes.

Justice CORRIGAN, dissenting, would affirm the defendant's sentences because the sentencing judge met the requirement of articulating his reasons for departure and because the majority, by requiring a sentencing judge to justify the proportionality of a departure sentence by anchoring it in the sentencing guidelines and by effectively requiring sentencing courts to compare a defendant's conduct and criminal history to other defendants' conduct and criminal histories, poses an overly burdensome and difficult task on sentencing courts that is outside the scheme the Legislature enacted for departures from the sentencing guidelines.

SENTENCES — SENTENCING GUIDELINES — DEPARTURES FROM SENTENCING GUIDELINES RECOMMENDATIONS — ARTICULATION OF REASONS FOR SENTENCING GUIDELINES DEPARTURES — APPELLATE REVIEW OF SENTENCES.

A trial court must articulate the rationale for any departure it makes from the minimum sentence range recommended under the sentencing guidelines; a court reviewing a departure may not substitute its own reasons for departure, nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the court articulated (MCL 769.34[3]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney,

Timothy A. Baughman, Chief of Research, Training, and Appeals, and *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for the defendant.

KELLY, J. At issue in this case is whether the trial judge fulfilled his obligation to articulate a substantial and compelling rationale for the sentences that he imposed. For each conviction, defendant's minimum sentence was an extreme upward departure from the range set by the sentencing guidelines. We conclude that the judge articulated adequate reasons to support *a* departure, but failed to justify the extent of this departure.

We hold that the departure was an abuse of discretion because the trial judge did not establish why the sentences imposed were proportionate to the offense and the offender. Therefore, we vacate defendant's sentences and we remand this case to the trial judge for resentencing and articulation of the rationale for the extent of any departure made on remand.

FACTS AND PROCEDURAL HISTORY

This is a case involving sexual abuse of a child. The victim's mother began taking the victim to defendant's home for day care when she was one year old. Over time, the mother developed a friendship with defendant and with his wife. The victim, whose family life was fatherless, chaotic, and disorganized, began to see defendant as a father figure. When the mother was sent to a halfway house for nine months for drug abuse, the victim and her younger sister moved into defendant's home. Eventually, the mother moved to Atlanta, Georgia, taking her children with her. However, the families stayed in touch and remained close. The victim and her sister returned to

Michigan during the summers to spend time with defendant and his wife.

When the mother lost her job in Atlanta, defendant and his wife offered to rent her a room. She accepted. After the school year ended, she sent her daughters back to Michigan to live with defendant and his wife. The victim was nine years old at the time. The mother followed her daughters to Michigan at the end of the summer. She, her two daughters, and their younger brother all shared a room in defendant's home.

The victim testified that defendant began to sexually abuse her when she was nine years old. All the assaults were similar. When the victim was alone on a couch with defendant watching television, defendant would touch her buttocks and penetrate her vagina and anus with his finger. The victim testified that defendant's actions frightened her and that defendant would stop assaulting her when she got up and left the room. The victim also testified that defendant threatened that he would evict her family from the house if she told anyone about the assaults.

The assaults continued over a 15-month period, until the victim revealed them to a friend. The information made its way to the victim's mother, who called the police. Defendant was charged with and a jury convicted him of three counts of first-degree criminal sexual conduct (CSC-I).[1] The recommended minimum sentence range under the sentencing guidelines was 9 to 15 years' imprisonment. The prosecutor requested that the trial judge sentence defendant to a minimum sentence at the high end of the guidelines with a "very, very lengthy tail."[2]

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[1] MCL 750.520b(1)(a).

[2] Generally, the punishment for CSC-I is imprisonment for any term of years or life. MCL 750.520b(2). When the trial court chooses to sentence a defendant to a term of years, it must fix both the minimum and maximum

The judge went further than requested. He imposed a minimum sentence for each conviction that exceeded the guidelines recommendation, explaining:

> This is the type of case that I think manifests the absolute worst type of exploitation. A child was placed in a position of trust and care with the defendant and his wife. This was at a time a 10 year old child had come from a clearly dysfunctional family, and this was an opportunity for [defendant] to provide a sense of refuge and a sense of stability clearly for [the victim].
>
> There was no male figure in her life, and [defendant] had that opportunity to fill that role, which could have been not only a blessing for him but certainly a blessing for [the victim].
>
> Those of us who have daughters certainly understand that fathers are in a very unique position with regard to their daughters and that we have the opportunity in many respects based on our relationship and the nature of the relationship that we have with our daughters to model or pattern the type of healthy or unhealthy relationship that young women then grow up to have with men in the future as adults.
>
> And so what happened here? Here this 10 year old child looking for, and in fact starved for a positive adult male role model ends up being over a period of about 15 months a sex toy for the defendant. To what extent she will be damaged in the future, who knows? One certainly hopes that she will be able to do well.
>
> But certainly this was a circumstance where [defendant] chose to exploit this relationship. And then in his testimony to blame the child, categorize her as a liar.
>
> And through this particular ordeal forcing the victim, this 10 year old, to have to go through a rather, for her, for a 10 year old, the kind of frightening gynecological type of examination certainly adding to the trauma in this particular

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terms of the sentence. MCL 769.9(2). Here, the prosecutor requested a minimum term within the statutory guidelines recommendation. The request for a "lengthy tail" was a request for a high maximum term.

> case, I think that certainly the Michigan Supreme Court in People versus Babcock has stated that if the Court is going to go outside the guidelines, the Court must in fact look to objective and verifiable facts and circumstances in evidence.
>
> Certainly it is an objective and verifiable fact that the defendant stood in the role of a parental figure for a child who had none. That this was a child who was sexually exploited over a period of 15 months. That's verifiable.
>
> These are the characteristics that I think don't adequately get covered in the guidelines. They don't. I mean it's unimaginable to me to think that a 10 year old who may be fearful of the fact that she may lose the roof over her head for herself, her mother and her two siblings, is forced to silently endure this kind of sexual exploitation.
>
> The guidelines didn't calculate that, but I am.

On a departure evaluation form, the judge summarized his reasons for the departure: (1) defendant's role as a child-care provider,[3] (2) the period over which the abuse occurred, (3) the defendant's threat to evict the victim and her family if she told anyone about his conduct, and (4) the gynecological examination the victim was forced to undergo. The judge sentenced defendant to three concurrent terms of 30 to 50 years' imprisonment, with credit for 23 days served. The minimum term of 30 years' imprisonment is twice the highest minimum term defendant could have received had the judge sentenced him within the guidelines recommendation.

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[3] Because the judge referred to defendant's status as a child-care provider, defendant argues that the judge violated MCL 769.34(3)(a). That statute prohibits a judge from exceeding the guidelines because of a defendant's legal occupation. The record indicates that defendant was not legally working as a child-care provider during the period in question. His wife was primarily responsible for the baby-sitting services they advertised, and the home was not licensed to provide child-care. We infer from the judge's statements that he referred to the child-care position because defendant had exploited his position of trust as a child-care provider for the vulnerable victim. We conclude that the judge did not depart on the basis of defendant's occupation.

The Court of Appeals affirmed defendant's convictions and sentences in an unpublished opinion per curiam.[4] It concluded that the reasons the judge gave for departure were objective and verifiable.[5] It further concluded that the judge did not abuse his discretion in determining that his reasons were substantial and compelling.[6] Finally, the Court of Appeals held that the sentences were proportionate to the seriousness of the crimes.[7]

Defendant applied for leave to appeal in this Court. We ordered oral argument on whether to grant the application or take other peremptory action.[8]

THE TRIAL COURT'S INITIAL BURDEN TO ARTICULATE SUBSTANTIAL AND COMPELLING REASONS FOR DEPARTURE

Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention.[9] Substantial and compelling reasons for departure exist only in exceptional cases.[10] "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons

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[4] *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2007 (Docket No. 267099).

[5] *Id*. at 5-6.

[6] *Id*. at 6.

[7] *Id*.

[8] 480 Mich 1014 (2008).

[9] *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003).

[10] *Id*.

in support of departure are to be assessed."[11] For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history.[12]

The trial court may not base a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight."[13]

On appeal, courts review the reasons given for a departure for clear error.[14] The conclusion that a reason is objective and verifiable is reviewed as a matter of law.[15] Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure.[16] A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes."[17]

Under MCL 769.34(7), the court must advise a defendant that he or she may seek appellate review of a sentence that is more severe than the guidelines recommendation. There is no preservation requirement for review of such a sentence.[18]

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[11] *Id.* at 262.

[12] *Id.* at 262-264.

[13] MCL 769.34(3)(b).

[14] *Babcock*, 469 Mich at 264.

[15] *Id.*

[16] *Id.* at 264-265.

[17] *Id.* at 269.

[18] MCL 769.34(7); MCR 2.517(A)(7).

In this case, the trial judge articulated the reasons for his departure. In particular, he referred to the 15-month period over which the serial abuse occurred. The fact that defendant abused the victim for more than a year was not reflected in the guidelines.

That sexual abuse occurred over a long period is an objective and verifiable reason for departure. The abuse in this case was not something that was completed quickly. For more than a year, the victim undoubtedly suffered psychological stress from the realization that defendant might abuse her again and again. This fact is of considerable worth in determining defendant's minimum sentence. Also, it is a fact that does not exist in all criminal sexual conduct cases. Hence, the trial judge did not abuse his discretion in concluding that the long period of abuse provided a substantial and compelling reason for departure.

The judge also relied on the fact that defendant threatened to retaliate by evicting the victim and her family if she disclosed to anyone his predatory sexual behavior. This is objective and verifiable because the threat was external to the minds of those involved and could be confirmed on the record. The judge did not abuse his discretion in concluding that this fact provided a substantial and compelling reason to depart. It was not considered in the guidelines, and making such a threat to a child could cause significant psychological anguish. It forced the child to choose between reporting the defendant's repeated criminal assaults and protecting her family from homelessness. The threat was distinct enough to actively and strongly draw the judge's attention.

The judge additionally relied on the gynecological examination the victim underwent as a result of defendant's sexual abuse. Defendant contends that such examinations are to be expected when sexual abuse has been alleged and

cannot constitute a substantial and compelling basis for departure. Defendant is correct that commonplace repercussions of criminal activity do not support departures, which may be made only in exceptional cases.[19] This is because the sentencing guidelines are designed to promote uniformity in criminal sentencing by " 'ensur[ing] that offenders with similar offense and offender characteristics receive substantially similar sentences.' "[20] Hence, we agree that this repercussion of criminal sexual conduct would not generally represent such a wide deviation from the norm that a departure could be premised on it.

However, under the unique circumstances of this case, the trial judge's conclusion that the gynecological examination provided a substantial and compelling reason for departure was not an abuse of discretion. The evidence indicates that the examination added considerably to the victim's trauma. This trauma was demonstrated by the victim's testimony that the examination was uncomfortable and embarrassing. More significantly, it was demonstrated by her behavior during the examination. Under these circumstances, the judge did not abuse his discretion in concluding that this repercussion of defendant's behavior was of considerable worth in determining the length of defendant's minimum sentence.[21]

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[19] *Babcock*, 469 Mich at 257-258.

[20] *Id.* at 267 n 21, quoting former MCL 769.33(1)(e)(*iv*), which specified some of the duties at the former Sentencing Commission in connection with the sentencing guidelines as added by 1994 PA 445.

[21] The judge also referred to defendant's exploitation of the victim's vulnerability as a basis for departure. However, this exploitation was, at least partially, already accounted for in the guidelines under offense variable 10 (OV 10). MCL 777.40. An offense characteristic taken into account in determining the sentencing range may not be a basis for departure unless the judge finds that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b).

By citing these facts that justified departure in this case, the trial judge met the initial burden of articulation.

PROPORTIONALITY

Having concluded that the trial judge cited substantial and compelling reasons to justify a departure, we turn to the question whether the reasons also justified the particular departure: a minimum sentence that is 15 years more than the top of the guidelines range. "The obligation is on the trial court to articulate a substantial and compelling reason for any departure."[22] However, the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made.

MCL 769.34(3) states:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in

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The judge's failure to address OV 10 leaves us unable to ascertain whether he believed the factor was given inadequate weight or whether he failed to recognize that the guidelines consider exploitation. We cannot discern whether the judge would have departed to the same degree had he referenced the offense variables, particularly OV 10, that arguably addressed some of the reasons cited for departure. This failure to address those variables is an additional basis for our remand for resentencing. See *Babcock*, 469 Mich at 260-261.

In her dissent, Justice CORRIGAN argues that this Court should infer that the judge considered the assessment of points for OV 10 and found the assessment inadequate. We disagree. The judge's statement that the "guidelines didn't calculate that," referring in part to exploitation, implies that he failed to recognize that points are assessed under the guidelines for exploitation of victim vulnerability. Given this statement and the lack of any specific reference to OV 10, we will not infer that the judge concluded that OV 10 inadequately considered the factor of exploitation. Our conclusion is not the equivalent of requiring "magic words" for departure, as Justice CORRIGAN suggests. *Post* at 336. We are simply refusing to infer that the judge meant one thing when he suggested the opposite.

[22] *Babcock*, 469 Mich at 259.

> chapter XVII if the court has a substantial and compelling reason for *that* departure and states on the record the reasons for departure. [Emphasis added.]

We have stressed that this statutory language requires the trial court to "justify the *particular* departure in a case, i.e., 'that departure.' "[23]

Appellate courts are obliged to review the trial court's determination that a substantial and compelling reason exists for departure.[24] Accordingly, the trial court's justification "must be sufficient to allow for effective appellate review."[25] In *Babcock*, this Court explained that an appellate court cannot conclude that a particular substantial and compelling reason for departure existed when the trial court failed to articulate that reason.[26] Similarly, if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.

The "principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed."[27] Hence, to complete our analysis of whether the trial judge in this case articulated substantial and compelling reasons for the departure, we must, of

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[23] *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001) (emphasis in original).

[24] *Babcock*, 469 Mich at 259.

[25] *Id*. at 259 n 13.

[26] *Id*. at 258-259.

[27] *Id*. at 262.

necessity, engage in a proportionality review. Such a review considers "whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record . . . ."[28] "[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment."[29]

As we noted in *Babcock*, the very purpose of the sentencing guidelines is to facilitate proportionate sentences. We stated:

> Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history.[30]

A sentencing departure is appropriate when "there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history . . . ."[31] The departure from the guidelines recommendation must "contribute to a more proportionate criminal sentence than is available within the guidelines range."[32]

Here the trial judge gave no explanation for the *extent* of the departure independent of the reasons given

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[28] *Id*.

[29] *Id*. at 263.

[30] *Id*. at 263-264.

[31] *Id.* at 264.

[32] *Id*.

to impose a departure sentence. Therefore, no justification was offered to support the large departure made.

One potential means of offering such a justification is to place the specific facts of a defendant's crimes in the sentencing grid. When that is done in this case, the result suggests that the sentence imposed was disproportionate. Defendant's crimes are classified as class A felonies.[33] The minimum sentence ranges for class A offenses (in months) are contained in the following grid:[34]

Prior Record Variable Level
(Total PRV Points)

Offense Variable Level (Total OV Points)	A 0 points	B 1-9 points	C 10-24 points	D 25-49 points	E 50-74 points	F 75+ points
I 0-19 points	21-35	27-45	42-70	51-85	81-135	108-180
II 20-39 points	27-45	42-70	51-85	81-135	108-180	126-210
III 40-59 points	42-70	51-85	81-135	108-180	126-210	135-225
IV 60-79 points	51-85	81-135	108-180	126-210	135-225	171-285
V 80-99 points	81-135	108-180	126-210	135-225	171-285	225-375 or life
VI 100+ points	108-180	126-210	135-225	171-285	225-375 or life	270-450 or life

The prior record variable (PRV) level is determined by the total points assessed for the prior record variables

[33] MCL 777.16(y).

[34] MCL 777.62.

scored. The offense variable (OV) level is determined by the total points assessed for the offense variables scored.

Defendant had a total PRV score of 20 points, which corresponds to a PRV level C.[35] The trial judge assessed 10 points for OV 10 (exploitation of a vulnerable victim) and 50 points for OV 11 (criminal sexual penetration), resulting in a total OV score of 60 points.[36] This corresponds to an OV level IV. Defendant's recommended minimum sentence range of 108 to 180 months is found by locating the intersection of PRV level C and OV level IV on the sentencing grid for class A felonies.[37]

The trial judge sentenced defendant as if his OV and PRV scores corresponded to the E-VI, F-V, or F-VI cell of the grid.[38] These cells provide the highest possible minimum sentences for class A felonies. For defendant's sentence to fall within the guidelines recommendation for the E-VI, F-V, or F-VI cell, the judge would have had to assess 20 to 40 additional OV points and 30 to 45 additional PRV points. On this record, it is hard to understand what factors would justify the extent of the departure made. That difficulty is compounded by the fact that the trial judge offered no justification why this departure was a proportionate one.

It is compelling to compare defendant's departure sentence, 30 to 50 years (360 to 720 months), with the recommended minimum sentences on the applicable

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[35] The judge assessed 20 points for PRV 7 (subsequent and concurrent felonies) because, as a result of this case, defendant had two concurrent felony convictions. MCL 777.57(1)(a).

[36] It appears that the judge erroneously assessed 50 points for OV 11. However, defendant admits that 50 points should have been assessed for OV 13 (continuing pattern of criminal behavior). Thus, a correction would not affect defendant's OV score.

[37] MCL 777.21(1)(c); MCL 777.62.

[38] See MCL 777.62.

sentencing grid. Given defendant's PRV level of C, his recommended minimum sentence could not have been 360 months. The highest recommended minimum sentence on the grid for that PRV level is 225 months.[39] Accordingly, simply comparing defendant's actual minimum sentences to the recommended minimum sentences for offenders with similar criminal histories suggests that defendant's sentences might be disproportionate.

Moreover, the substantial and compelling reasons on which the judge based his departure were related to the nature of the offense, not to the extent of defendant's criminal history. Put otherwise, the departure reasons pertained to defendant's OV score, not his PRV score. With regard to the OV score, it is theoretically possible for a defendant to receive a total of 590 points for a crime against a person, such as CSC-I.[40] If a defendant has a low PRV score but an OV score over 100, the court may render a proportionate sentence above the highest minimum for someone with a similar PRV score. This is

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[39] *Id.*

[40] MCL 777.22(1) requires the court to score the following offense variables for all crimes against a person (maximum scores are in parentheses): OV 1 (aggravated use of a weapon) (25 points), MCL 777.31(1)(a); OV 2 (lethal potential of weapon) (15 points), MCL 777.32(1)(b); OV 3 (physical injury to victim) (100 points), MCL 777.33(1)(a); OV 4 (psychological injury to victim) (10 points), MCL 777.34(1)(a); OV 7 (aggravated physical abuse) (50 points), MCL 777.37(1)(a); OV 8 (asportation of victim) (15 points), MCL 777.38(1)(a); OV 9 (number of victims) (100 points), MCL 777.39(1)(a); OV 10 (15 points), MCL 777.40(1)(a); OV 11 (50 points), MCL 777.41(1)(a); OV 12 (contemporaneous felonious acts) (25 points), MCL 777.42(1)(a); OV 13 (50 points), MCL 777.43(1)(a); OV 14 (offender's role) (10 points), MCL 777.44(1)(a); OV 19 (security threats or interference with justice) (25 points), MCL 777.49(1)(a); and OV 20 (terrorism) (100 points), MCL 777.49a(1)(a). Obviously, many of these variables could not be scored in this case or in most criminal sexual conduct cases. I list them to demonstrate that more than 100 points are possible under PRV level C.

because the Legislature did not contemplate a defendant with such a high OV score, given that it used 100 OV points as the maximum for the grid.

However, that is not the case here, because defendant's OV score is within the lower OV levels on the grid. Thus, the trial judge must explain why the reasons for the departure that he articulated warranted a drastic departure from the highest minimum available for a defendant with a similar PRV score. The burden will be heavy, because the sentence imposed is literally off the charts for a defendant with a criminal background similar to that of this defendant.

A comparison of defendant's sentences to the sentences recommended for other offenders who committed the same type of crime suggests that defendant's sentences might be disproportionate. Although the atrocity of any criminal sexual conduct offense is not to be minimized, proportionality is still judged by weighing both the nature of the offense and the offender's criminal history. Given the fact that defendant had no criminal history, the 30-year minimum sentence imposed for each conviction might be a disproportionate departure.

Certainly, a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing range grid. However, we think that reference to the grid can be helpful, because it provides objective factual guideposts that can assist sentencing courts in ensuring that the " 'offenders with similar offense and offender characteristics receive substantially similar sentences.' "[41]

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[41] *Babcock,* 469 Mich at 267 n 21, quoting former MCL 769.33(1)(e)(*iv*), as added by 1994 PA 445. The statutory sentencing guidelines are based on statewide sentencing data. They reflect the Legislature's judgment about how the variables of mitigation and aggravation should be applied

Appellate review is also aided when a court explains the similarity between the facts justifying the departure and the facts describing a crime meriting the same sentence under the guidelines. Also, a comparison of a defendant's characteristics and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence is a valuable exercise. This, too, will aid an appellate court in reviewing the proportionality of the departure.

The trial court should note which variables it is considering in such a comparison. It should explain why its reasons for departure are as significant as the characteristics that would produce an equally lengthy recommended minimum sentence under the guidelines.

Turning to the facts in the instant case, it is obvious that CSC-I involving a nine-year-old child is a heinous crime. It damages children, families, and friendships. But all CSC-I cases do not wreak the same amount of damage. That the sexual abuse in this case occurred over a 15-month period is extraordinarily disturbing, as the trial judge recognized. That defendant threatened to evict the victim and her family if she reported the crime is also of considerable importance in determining defendant's sentence. That the victim underwent a traumatic gynecological examination is also of consequence.

The trial judge articulated some appropriate reasons for departure, but failed to explain why those reasons justify the extent of the departure. Furthermore, it is not readily apparent why such a substantial departure

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to reach a proportionate sentence. Accordingly, the sentencing grids provide an objective source of data on sentencing. The statutory guidelines, and the judicial guidelines that preceded them, were designed to avoid individual and regional variation in sentencing. Hence, using the grid as a reference point to assess and anchor a departure is an exercise well-designed to promote uniformity.

is warranted on the basis of those reasons. While defendant's crime is most certainly heinous, we cannot discern why the trial judge selected a minimum sentence so far in excess of the recommended guidelines range.[42] We cannot uphold such an unsupported departure.

As noted earlier, the sentencing guidelines were designed to promote uniformity in sentencing. One of the purposes of the proportionality requirement is to minimize idiosyncrasies. We do not suggest that trial courts must sentence defendants with mathematical certainty.[43] Nor are any precise words necessary for them to justify a particular departure.[44]

Ultimately, in reviewing sentences, appellate courts examine the reasons articulated for departure. The trial court's articulation must be sufficiently detailed to facilitate appellate review. This includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been. Here the trial judge failed to offer any valid explanation justifying why he chose to sentence defendant to minimum terms of imprisonment of 30 years. As such, we must vacate defendant's sentences and remand the case to the trial judge so that he may articulate why this level of departure is warranted or resentence defendant.

RESPONSE TO JUSTICE CORRIGAN'S DISSENT

Contrary to Justice CORRIGAN's assertion, our approach is completely consistent with *Babcock* and the language of MCL 769.34. We emphasize in this opinion

[42] A departure cannot be justified on the sole basis that a crime is heinous. All criminal-sexual-conduct cases involving young children are heinous. Certainly the Legislature did not overlook this basic fact when establishing sentencing guidelines for these crimes.

[43] *Babcock*, 469 Mich at 260 n 14.

[44] *Id*. at 259 n 13.

a point that was made in *Babcock*. It is that, under MCL 769.34(3), "the trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed."[45] Although Justice CORRIGAN argues that neither *Babcock* nor MCL 769.34 requires that this case be remanded, she fails to identify where in the record the trial judge justified the *particular* departure he made. She cannot identify it because the trial judge failed to provide it. We cannot uphold a departure when the connection between the reasons given for departure and the extent of the departure is so unclear. To do so would be akin to immunizing sentencing decisions from review for proportionality. Moreover, it would undermine the Legislature's goal in enacting the sentencing guidelines.

The Legislature adopted the guidelines to promote uniform sentencing across the state.[46] The general rule is that minimum sentences must be within the recommended guidelines range.[47] A defendant is entitled to be sentenced within that range unless the judge provides a substantial and compelling reason why a departure sentence is more proportionate to the offense and the offender. The judge must explain why a sentence outside the range better promotes uniform sentencing, in accordance with the purpose of the guidelines.

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[45] *Id*. at 260.

[46] See former MCL 769.33(1)(e)(*iv*), as added by 1994 PA 445. This provision was the part of the Code of Criminal Procedure that created the Sentencing Commission. The Legislature repealed the provisions in the code pertaining to the commission, including MCL 769.33(1)(e)(*iv*), after it enacted the sentencing guidelines. See 2002 PA 31. But the fact that it repealed the provision as part of the elimination of the Sentencing Commission does not mean that the Legislature abandoned its goal of uniformity in sentencing. Rather, it represents the fact that the Legislature concluded that the Sentencing Commission had done all that it could to further that goal.

[47] MCL 769.34(2).

Justice CORRIGAN contends that it is sufficient to further the legislative goal of sentencing uniformity to require judges to articulate substantial and compelling reasons for their departures. She argues that this requirement ensures that departures are difficult enough to justify that the exception does not swallow the rule. She further asserts that, as long as the record supports *a* departure, *any* departure sentence should be upheld on appeal as long as it is reasonable. She rejects this Court's holding in *Babcock* when she opines that a judge should not be required to justify the particular departure sentence imposed.

Justice CORRIGAN relies on MCL 769.34(11), which states:

> If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

Justice CORRIGAN misconstrues this provision by failing to read it in the context of the rest of the statute.

In MCL 769.34(3), the Legislature put the burden on the trial court to place on the record one or more substantial and compelling reasons for a particular departure.[48] Hence, it is the trial court that must justify *on the record* both the departure and the extent of the departure.[49] This is not to say that appellate courts need

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[48] See MCL 769.34(3); *Babcock*, 469 Mich at 259-260.

[49] Justice CORRIGAN is mistaken when she opines that, by requiring courts to justify the particular departure, we read into the statute something that is not there. The Legislature has required the trial court to state a substantial and compelling reason justifying the departure. MCL 769.34(3). Our opinion today merely provides guidance to trial courts on how they may formulate and articulate that justification. It is,

examine only the sentencing transcript to determine if the court abused its discretion in imposing a sentence. Under MCL 769.34(11), appellate courts review the record to ascertain if the court articulated adequate reasons for the departure and to justify the extent of the departure. If, after reviewing the whole record, the connection between the reasons given for departure and the extent of the departure is unclear, then the sentence cannot be upheld.[50]

Moreover, simply requiring a court to articulate substantial and compelling reasons for a departure would not promote uniformity. Trial courts would not be constrained to impose only those sentences that they can justify. Under the rule advocated by Justice CORRIGAN, defendants with similar offense and offender characteristics could receive widely divergent departure sentences. Justice CORRIGAN would not subject sentences based on a departure to full appellate review. Any arguably reasonable sentence would be upheld, even if it were not proportionate to the offense and the offender. A lack of meaningful review would inevitably encourage idiosyncratic sentencing. Such a result is contrary to the Legislature's express intent.[51]

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in fact, our duty to give guidance to the bench and bar in such matters.

[50] However, appellate courts may not review the record to search for reasons to uphold a sentence that the trial court failed to justify. *Babcock*, 469 Mich at 258-259.

[51] See former MCL 769.33(1)(e)(*iv*), as added by 1994 PA 445. Justice CORRIGAN's conclusion that the Legislature desired that a less stringent standard of uniformity pertain to departure sentences, *post* at 338, is incorrect. The Legislature permitted departures with the understanding that the guidelines could not account for all conceivable scenarios. However, that fact does not alter the overarching goal of uniformity in all sentencing. Rather, it constitutes the Legislature's recognition that uniformity can be advanced only if departures from the guidelines are limited to cases involving unusual circumstances.

The requirement that the trial court justify the extent of the departure is not overly burdensome. The court need only reasonably comply with the statutory articulation requirement in order to facilitate appellate review. Justice CORRIGAN expends a great deal of energy attempting to rebut an argument that we do not make: that a trial court must provide a mathematical justification for its departure.

Our observation that grounding a departure in the sentencing guidelines will help to explain the extent of the departure does not mean that departure can be reduced to a mathematical equation. To the contrary, mathematical precision in sentencing is neither required nor possible. Nonetheless, the difference between the sentence imposed based on a departure and the recommended minimum sentence range under the guidelines is relevant to the proportionality analysis. When Justice CORRIGAN advocates upholding defendant's sentences even though the judge failed to justify this difference, she disregards *Babcock*.

Justice CORRIGAN relies heavily on the United States Supreme Court decision in *Gall v United States*.[52] There the Court addressed whether an appellate court reviewing a substantial variance from the federal sentencing guidelines could require that the departure be justified by "extraordinary circumstances."[53] The *Gall* Court

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With respect to departures, we must determine whether the trial court abused its discretion in imposing the sentence by weighing whether the reasons given justify the departure. We ask whether the court imposed a sentence that is not proportionate to the offense and the offender and thereby abused its discretion. We would be derelict in our duty to advance the Legislature's goal of uniform sentencing if we imposed a less stringent standard of review on sentences that are based on a departure.

[52] *Gall v United States*, 552 US___; 128 S Ct 586; 169 L Ed 2d 445 (2007).

[53] *Id*. at ___; 128 S Ct at 591.

held that an appellate court could consider the degree of deviation from the federal sentencing guidelines when reviewing a departure.[54] However, it rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range."[55] The *Gall* Court also rejected "the use of a rigid mathematical formula" in gauging the justifications for the departure.[56]

Much of the *Gall* Court's analysis is inapplicable to Michigan's indeterminate sentencing guidelines. The federal sentencing guidelines are not mandatory.[57] By contrast, a sentence in Michigan must be within the guidelines recommendation unless the court states on the record one or more substantial and compelling reasons to depart from it.[58] Substantial and compelling reasons for departure exist only in exceptional cases.[59] And when a trial court renders a departure sentence, Michigan appellate courts *must* review whether the court abused its discretion in concluding that extraordinary circumstances justified it.

To the extent that Justice CORRIGAN relies on *Gall* to reject the use of a rigid mathematical formula, her reliance is misplaced. As previously indicated, we do not adopt a rigid mathematical formula. Instead, consistently with *Gall*, we stress that the difference between a departure sentence and one within the recommended guidelines range is relevant to the proportionality analysis.[60] Accordingly, it is appropriate for courts to articulate the

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[54] *Id*. at ___; 128 S Ct at 594-595.

[55] *Id*. at ___; 128 S Ct at 595.

[56] *Id*. at ___; 128 S Ct at 595.

[57] *Id*. at ___; 128 S Ct at 594.

[58] *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007).

[59] *Babcock*, 469 Mich at 257-258.

[60] *Gall*, 552 US at ___; 128 S Ct at 591.

required justification for departure by anchoring that justification in the sentencing guidelines.

Justice CORRIGAN buoys her position with facts that are not relevant. For instance, it is true that the trial judge in this case could have imposed a life sentence. But this fact does not bear on whether he justified the sentence he actually imposed. Similarly, Justice CORRIGAN spends considerable time discussing the behavior of defendant's wife during the trial. But even if the wife's behavior could be attributed to defendant, the judge did not cite it as a basis for departure. Accordingly, it cannot support the departure made.[61]

Justice CORRIGAN suggests that our analysis resembles de novo review.[62] Her assertion is unexplained and misguided. We continue to review for an abuse of discretion. We weigh whether the reasons that the trial court gave are substantial and compelling enough to justify the departure sentence imposed. In this case, the judge abused his discretion because he imposed a departure sentence without adequately justifying the extent of the departure. Therefore, the sentence falls outside the range of principled outcomes.

The analysis set forth in this opinion is consistent with MCL 769.34 and with the caselaw interpreting that statute. Moreover, it is not overly burdensome, and it advances the Legislature's goal of sentencing uniformity. The same cannot be said for Justice CORRIGAN's analysis.

SUMMARY

In order to assist trial courts in fulfilling their statutory obligations, we offer the following summary:

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[61] *Babcock*, 469 Mich at 258-259.

[62] *Post* at 334 n 4.

(1) The trial court bears the burden of articulating the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.

(2) The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made.

(3) The trial court's articulation of reasons for the departure must be sufficient to allow adequate appellate review.

(4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.

(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.

(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence.

(7) Departures from the guidelines recommendation cannot be assessed with mathematical precision. The trial court must comply *reasonably* with its obligations under the guidelines, as set forth in this opinion, to further the legislative goal of sentencing uniformity.

CONCLUSION

Some of the reasons that the trial judge articulated as the basis for the departure are legitimate. However, those reasons fail to justify the severity of the minimum sentences that he imposed. From our review of the record and of the judge's reasons for departure, it is unclear why a minimum sentence of 30 years' imprisonment is warranted for this defendant.

We vacate defendant's sentences and remand this case to the trial judge for resentencing and for an explanation of the extent of any departure made on remand. We deny leave to appeal in all other respects.

TAYLOR, C.J., and CAVANAGH, YOUNG, and MARKMAN, JJ., concurred with KELLY, J.

MARKMAN, J. (*concurring*). I concur fully with the majority opinion. I write separately to respond briefly to Justice CORRIGAN's dissent and to emphasize one point that I believe is implicit in the majority opinion, but ought to be made explicit.

First, what separates the dissenting justices from the majority justices is not the former's conviction that defendant's 30-year minimum sentences "fall within the range of reasonable opinions regarding what sentences are appropriate in this case." *Post* at 357. Rather, it is the latter's conviction that the Legislature's purposes in enacting the sentencing guidelines—

in particular the attainment of reasonably uniform and proportionate criminal sentences—can only be achieved if the guidelines are understood to mean what they say. Justice CORRIGAN fails to take sufficient account of the dispositive language in the present controversy:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the *court* has a substantial and compelling reason for *that* departure and states on the record the reasons for departure. [MCL 769.34(3) (emphasis added).][1]

Thus, we can derive the following from this statute: (1) it is the *sentencing* court that must "state[] on the record the [substantial and compelling] reasons for departure," not the appellate court, and (2) the sentencing court must articulate its reasons in support of "that" departure, not "some" departure, not "any" departure, and not "a" departure.[2]

These requirements are an obvious function of the overall purpose of the guidelines, which is to diminish the sentencing discretion of individual judges, and to temper

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[1] Justice CORRIGAN criticizes the majority for relying on a "single word"—"that"—in MCL 769.34(3). *Post* at 352. However, this Court "interpret[s] *every* word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage," *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006) (emphasis added). To recall merely one previous decision in accord with this rule, we have placed great weight on whether "a" or "the" was employed in a statute. See *Robinson v Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000).

[2] Justice CORRIGAN would essentially compress what is in reality a two-part burden on the sentencing court into a single burden, by requiring the court to ask simply if "substantial and compelling" reasons exist for a departure. If so, then no further explanation would be required concerning the *extent* of a departure. She reaches this conclusion by removing from context MCL 769.34(11), which addresses appellate review generally, instead of harmonizing that provision with MCL 769.34(3), which sets forth a sentencing court's specific burdens under the sentencing guidelines.

aberrational or idiosyncratic sentencing decisions by substituting legal rules. The guidelines are intended to eliminate widely disparate sentences in which punishments may be more closely related to the predispositions of individual judges than to the predispositions of the people, as reflected through their representatives. Uniformity and proportionality of criminal sentences simply cannot be attained if departure sentences are largely exempted from legal rules under the guidelines, and MCL 769.34(3), in fact, establishes these rules: (a) the requirement that the sentencing court articulate reasons why a guidelines-range sentence is inadequate, and (b) the articulation of reasons in support of a specific departure sentence.[3] Notwithstanding, for example, that each lies outside a guidelines range of 9 to 15 years, there is a considerable difference between a 16-year and a 30-year minimum sentence, and the sentencing court must sufficiently justify these different decisions. This is not, as Justice CORRIGAN suggests, because of any "unreasonably burdensome" requirements imposed by this Court, *post* at 356, but because the Legislature has required this. The question in reviewing criminal sentences is not whether a sentence is "reasonable," *post* at 357, but whether it is *lawful*, i.e., in compliance with both the substance and the procedure of the guidelines.

Were Justice CORRIGAN's position to prevail, the reforms achieved by the sentencing guidelines would be significantly undermined. The goal of reasonably uniform punishments, in which similarly situated offenders are ac-

[3] Although Justice CORRIGAN asserts that the majority "enacts a new, corollary sentencing regime by extending the sentencing guidelines to apply to departure sentences," *post* at 330, all that the majority asserts in reality is that departure sentences are no more exempt from the restraint of legal rules than non-departure sentences. The articulation of a "substantial and compelling" reason for departing from the guidelines does not constitute an all-purpose warrant for a departure of *any* magnitude.

corded reasonably similar punishments, would be significantly diluted. Defendant here, like every other criminal defendant, is entitled to be sentenced within the minimum-sentence range recommended under the legislatively mandated guidelines range, which, for defendant, has as its maximum 15 years' imprisonment. That is because this is the law. It can be assumed that each and every criminal sexual exploitation of a child is "heinous" and "atrocious," and yet this remains the punishment the people of Michigan have seen fit to establish in their law. When, however, there is a basis for an upward departure from the guidelines because there are factors that have not been taken into consideration, that departure is permissible, but it too must be done in accordance with the law. The sentencing judge may depart from the guidelines range, but he must articulate the basis for doing so, and he must explain why an alternative sentence *better* comports with the aims of the law, in particular the law's pursuit of proportionate and uniform criminal sentences.

Justice CORRIGAN would essentially exempt from these standards that part of a potential criminal sentence lying outside the guidelines range, which in the present case would exempt nearly 90 percent of defendant's potential sentence from even rudimentary appellate review.[4] Defendants sentenced within the guidelines range would be subject to the standards of proportionality and uniformity, while defendants sentenced outside this range would be restored to a pre-guidelines environment in which individual judges could impose widely disparate sentences without mean-

[4] Reflecting a theme running throughout her opinion, Justice CORRIGAN asserts that the majority opinion will result in "incomplete scrutiny" of departure sentences. *Post* at 334 n 4; see also note 6 of this opinion. However, in pursuing the goals of uniformity and proportionality among departure sentences, it is hardly compelling to argue that this is better not done at all than through imperfect means.

ingful appellate review. Once grounds have been articulated for proceeding outside the guidelines range (in this case, a minimum sentence of 9 to 15 years), it would be of little moment whether the sentencing judge imposed a 16-year or a 30-year sentence following an upward departure, or an 8-year or a 2-year sentence following a downward departure, for the dissenting justices see little need to justify the *actual* sentence given to a defendant.[5]

The sentencing guidelines were designed to restrain judicial sentencing discretion, so that punishments would effectively be determined by the people through their representatives, rather than by the serendipity of whether Lenient Larry or Maximum Mike happened to be the sentencing judge. The direction of the dissents is toward the restoration of a system in which citizen judgments concerning appropriate criminal punishments would be supplanted by the decision-making of individual judges. In place of what has proven to be a successful reform of the criminal-justice system, and the attainment of a heightened rule of law, the dissenting justices, by eroding the sentencing guidelines, would restore a heightened rule of judges.

Second, I would emphasize that the majority does not assert that analogizing to the sentencing grid constitutes

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[5] Justice CORRIGAN asserts that departure sentences are "not governed by the general rule of uniformity" that applies to guidelines-range sentences, because "[d]eparture sentences generally involve less quantifiable facts . . . ." *Post* at 338, 337-338. However, "quantifiability" is not the distinguishing characteristic between guidelines-range sentences and departure sentences. That is, a departure sentence may be based on nothing more than the fact that the guidelines do not fully account for the sheer *number* of victims harmed by the defendant, a readily "quantifiable" number. Moreover, departure sentences must be based upon "objective and verifiable" factors, *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003), hardly a synonym for "non-quantifiable." There are not two tiers of criminal sentences in Michigan, one in which uniformity and proportionality are sought, and another in which they are not.

the *exclusive* means by which a court may seek to justify a particular departure; rather, it holds that *some* means is necessary to "justify why [the sentencing court] chose the particular degree of departure," *ante* at 318, and that using the sentencing grid constitutes one "potential means of offering such a justification." *Ante* at 306. I agree with this.

However, one additional logical method by which to justify a particular departure, perhaps not worth belaboring because of its obviousness, is for the court simply to *compare* a sentence to others imposed in reasonably similar cases. This method derives from the basic principle underlying our sentencing system: securing a proportionate criminal sentence. A proportionate sentence is one that adequately reflects " 'the seriousness of the defendant's conduct and . . . the seriousness of his criminal history.' " *Ante* at 305, quoting *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Assessing the seriousness of a defendant's conduct and his criminal history necessarily entails that a sentencing court will engage in some comparison between criminal offenses. That is, the seriousness of a defendant's conduct and a defendant's criminal history is not measured in a vacuum; rather, in answering the question of how "serious" a crime is, the court is essentially asking itself whether that crime is of greater or lesser gravity than other criminal offenses and "determining where, on the continuum from the least to the most serious situations, an individual case falls . . . . " *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). Thus, a comparison of a departure in one case to those imposed in reasonably similar cases constitutes one reasonable method by which a sentencing court may seek to fashion a proportionate sentence.

It may well be that judges initially will primarily consider reasonably similar cases decided by themselves

or by geographically proximate judges.[6] Thus, there may be some anecdotal or arbitrary quality to this process, which must be cautioned against. However, over time, as the guidelines, and judicial interpretations of these guidelines, become more deeply embedded in our justice system, it may be expected that more sentencing data will be collected and maintained, and that judges will possess some greater capacity to search broadly for relevant cases with which to compare their own. Especially as more appellate decisions are rendered with regard to departure sentences, case comparisons should become increasingly useful and less a matter of happenstance.

Thus, along with analogizing to the sentencing grid, one additional method for justifying a particular departure is to simply look to sentences imposed in reasonably similar cases. Given the current limited availability of such information in the legal marketplace, this will not always be possible, but where it *is* available, it should be welcomed and used. In appropriate instances, such information can assist the sentencing court in properly placing a case along a continuum of reasonably similar cases, and thereby fashioning a more proportionate and uniform sentence.

WEAVER, J. (*dissenting*). I dissent from the majority's decision to remand this case to the trial court for

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[6] Justice CORRIGAN expresses her belief that "case comparison will [not] become meaningfully less arbitrary over time," and that there exists a "potential to increase disparities in local sentencing practices." *Post* at 331-332 n 2. However, better that there be imperfect comparisons than no comparisons at all, as apparently preferred by Justice CORRIGAN. Over time, as sentencing data accumulate under the guidelines, as I believe it will, such comparisons will increasingly tend to become valuable in achieving reasonable sentencing uniformity and proportionality. I fail to see any "inconsisten[cy]," *id*. at 332, in my belief that comparisons of cases constitute one essential and obvious means of furthering these goals.

resentencing. I disagree that the trial court failed to explain why it made the specific departure it imposed as a sentence in this case. For the reasons stated in the judgment of the Court of Appeals, as set forth below, I would affirm that judgment, which affirmed the trial court's departure from the sentencing guidelines:

> Finally, the trial court must consider proportionality. If a trial court finds that there are substantial and compelling reasons to believe that sentencing a defendant within the [sentencing] guidelines range would not be proportionate to the seriousness of the defendant's conduct and criminal history, then the trial court should depart from the guidelines. [*People v*] *Babcock,* [469 Mich 247,] 264 [666 NW2d 231 (2003)]. "In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range." *Id.* at 272, citing MCL 769.34(3). "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Id.* at 262. In other words, the principle of proportionality requires that a sentence "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn,* 435 Mich 630, 636, 651; 461 NW2d 1 (1990).
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> "This Court reviews for clear error a trial court's factual findings at sentencing." *People v Mack,* 265 Mich App 122, 125; 695 NW2d 342 (2005). Specifically, the "existence or nonexistence of a particular sentencing factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003) (internal quotation marks, brackets and citations omitted). "The determination that a particular sentencing

factor is objective and verifiable should be reviewed by the appellate court as a matter of law." *Id*. (internal quotation marks, brackets and citations omitted). Finally, a "trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *Id*. at 274 (internal quotation marks and citations omitted). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id*.

Here, defendant's guidelines range, for the minimum sentence, was 9 to 15 years. The trial court sentenced defendant to a minimum of 30 years' imprisonment. At sentencing, the trial court stated reasons for the departure:

"Certainly it is an objective and verifiable fact that the defendant stood in the role of a parental figure for a child who had none. That was a child who was sexually exploited over a period of 15 months. That's verifiable.

"These are characteristics that I think don't adequately get covered in the guidelines. They don't. I meant [sic] it's unimaginable to me to think that a 10 year old who may be fearful of the fact that she may loose [sic] the roof over her head for herself, her mother and her two siblings, is forced to silently endure this kind of sexual exploitation.

"The guidelines didn't calculate that, but I am."

In the Departure Evaluation Form, the trial court reiterated the previously stated reasons for departing from the guidelines' recommended minimum sentence range, and added an additional reason:

"Defendant served as child care provider for nine years and molested the victim over a 15 month period.

"Defendant threatened to evict the child victim and her family if she told anyone about the [criminal sexual conduct].

"Child victim was forced to undergo a painful physical exam as a result of the incident."

We conclude that the articulated reasons for the depar-

ture were objective and verifiable. [*People v*] *Abramski*, [257 Mich App 71, 74; 65 NW2d 501 (2003)]. It is objective and verifiable that defendant served as child care provider for nine years. The lower court record reveals that, with the exception of a three year period, defendant and [his wife, Carol Smith,] provided child care for the victim in their home from the time she was one year old in 1994 until the victim was 10 years old. During the time the victim was out of defendant's home, he kept in close contact with her through cards and phone calls. According to defendant's own testimony, the victim "became like part of the family" during the time he cared for her.

Additionally, the lower court record reveals that the sexual abuse occurred over a period of 15 months. The first incident occurred sometime in May 2002, when the victim was nine years old. The last incident took place sometime at the end of July 2003, approximately three weeks before the victim revealed the allegations on August 20, 2003. The jury necessarily found that these instances of abuse occurred, because it found defendant guilty on all three counts. Thus, the fact of the abuse over this period of time has been objectively verified by the trier of fact. Thus, it is objective and verifiable that defendant served as child care provider for many years and molested the victim over a period of 15 months.

It is also objective and verifiable that defendant threatened to evict the victim and her family. This threat is not based solely on the testimony of the victim, because it is not disputed that defendant threatened to evict the victim and her family. Finally, it is objective and verifiable that the victim was forced to undergo a physical examination as a result of the abuse. There can be no reasonable dispute that the victim was subjected to a physical examination on August 22, 2003.

The trial court did not abuse its discretion in determining that these factors constituted substantial and compelling reasons for an upward departure. *Babcock, supra* at 264-265. In determining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id*.

at 270. Defendant chose a victim who was nine years old and preyed on her vulnerability and sense of security as a member of defendant's household. Contrary to defendant's argument on appeal, a review of the sentencing transcript shows that the trial court did not rely on Carol's accusations regarding the prosecutor in determining whether to depart from the guidelines. Defendant's argument in this regard is mere speculation. As the trial court indicated, it is apparent that the sentencing guidelines were not capable of adequately accounting for the true seriousness of these offenses.

Finally, defendant argues that the upward departure from the recommendation of the guidelines was not proportionate. We disagree. The trial court's upward departure was proportionate to defendant and the seriousness of the offense. The trial court addressed the offender, and the sentencing transcript demonstrates that the sentence was individualized. Contrary to defendant's argument on appeal, lack of a prior record is not sufficient to overcome the presumption of proportionality. See *People v Piotrowski,* 211 Mich App 527, 533; 536 NW2d 293 (1995). Moreover, the circumstances surrounding the instant offenses establish the serious and reprehensible nature of defendant's crimes. Appellate courts should consider whether the circumstances surrounding a defendant's conviction place that defendant in the least or most threatening class with respect to that particular crime. *Milbourn, supra* at 654. The record reveals that defendant engaged in the continued sexual assault of a minor child on numerous occasions over a 15 month period. Most of these instances occurred while the victim's siblings and mother were in the home. After a review of the entire record, we conclude that the sentences imposed by the trial court are proportionate to the seriousness of the crimes, and thus, do not violate the principle of proportionality. *Babcock, supra* at 264, 273. [*People v Smith,* unpublished opinion per curiam of the Court of Appeals, issued July 19, 2007 (Docket No. 267099), pp 4-6.]

CORRIGAN, J. (*dissenting*). I respectfully dissent. Circuit Judge Timothy M. Kenny more than adequately

justified the 30-year minimum sentences he imposed for defendant's repeated sexual exploitation of his 10-year-old victim. Indeed, the judge was statutorily authorized to impose a *life* sentence for defendant's crimes.[1] Judge Kenny fully complied with his duty under MCL 769.34(3) to state his reasons for "that departure" imposed. The statute does not require a trial judge to chart the sentence imposed for a particular crime by locating it on an elusive spectrum of hypothetical offenses as the majority today mandates. In effect, the majority enacts a new, corollary sentencing regime by extending the sentencing guidelines to apply to departure sentences. In doing so, the majority's approach directly contradicts *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), and *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995). *Babcock* applied the *Fields* Court's definition of "substantial and compelling reasons" to that phrase as it appears in MCL 769.34. *Babcock*, 469 Mich at 257. The very purpose of requiring a trial judge to articulate such reasons was to allow for exceptions to statutorily defined sentences *while restricting individual judges' abilities to depart*. *Fields*, 448 Mich at 68-69. Thus, legislatively imposed restrictions on departures are inherent in the definition of "substantial and compelling reasons" and provide the safety valve necessary for an appellate court to gauge whether a trial judge abused his sentencing power. The majority wrongly concludes that a new, judicially imposed regime is necessary for meaningful appellate review.

Although the majority's approach may provide helpful guidance to trial judges in some cases, I respectfully contend that it is not in our power to impose new,

[1] Under MCL 750.520b(2), defendant was automatically eligible to serve a life sentence for each of his three convictions for first-degree criminal sexual conduct.

mandatory sentencing requirements that the Legislature has not chosen to adopt for departures. The legislative scheme requires appellate courts to *review the record* to determine whether the facts support the departure. It does not require courts to posit a continuum of hypothetical similar crimes and locate the sentencing offense on that continuum. Moreover, I fear that complying with the majority's proposed requirements will be essentially impossible in many cases and appellate review will not be aided. I would affirm defendant's sentences instead of imposing a new layer of unjustified burdens on the trial bench.

Significantly, I have no qualms with many of the majority's general statements. I agree that the trial court "bears the burden of articulating the rationale for . . . departure," that the court "must articulate one or more substantial and compelling reasons that justify the departure it made," and that its articulation "must be sufficient to allow adequate appellate review." *Ante* at 318. I also agree that, to be proportionate, a minimum sentence that falls outside the guidelines range "must be more appropriate to the offense and the offender than a sentence within the guidelines would have been." *Ante* at 318. Further, it *may* be "*appropriate* to justify the proportionality of a departure sentence by . . . anchoring it in the sentencing guidelines." *Ante* at 318 (emphasis added).[2] But despite its permissive lan-

[2] It also may be helpful to compare sentences in similar cases, as Justice MARKMAN suggests. I do not oppose trial courts' attempts to do so. My central point is that our statutory scheme simply does not require this exercise. Moreover, because each case is unique, the comparison Justice MARKMAN advocates may not always be possible or productive. Significantly, Justice MARKMAN concedes that his approach may have "some anecdotal or arbitrary quality . . . . " *Ante* at 325. I agree. But I also question whether case comparisons will become meaningfully less arbitrary over time, as Justice MARKMAN supposes, if judges "consider reasonably similar cases decided by themselves or by geographically

guage,[3] the majority effectively mandates its new regime. As is clear from this case, a departure sentence—indeed, a sentence that is not even the highest possible for the offense—for a crime that we unanimously agree is "heinous," see *ante* at 310, is being vacated because the trial court did not comply with the majority's new requirements. Accordingly, I dissent both because I believe that Judge Kenny met the requirement of articulation in this case and because I think that the majority poses an overly burdensome and often impossible task on sentencing courts that is outside the scheme for departures that our Legislature adopted.

The majority acknowledges that, as a reviewing court, we are bound to give significant deference to a trial court's sentencing decisions. *Ante* at 300. Most significantly, we review for an abuse of discretion the trial court's determination that particular facts are substantial and compelling reasons for the departure imposed. *Babcock*, 469 Mich at 264-265. *Babcock* succinctly circumscribed the abuse of discretion standard of review in this context:

> At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more

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proximate judges." *Ante* at 324-325. Rather, such comparisons have the potential to increase disparities in local sentencing practices, contrary to Justice MARKMAN's stated goal of statewide consistency in guidelines sentencing. Thus, Justice MARKMAN's position that judges should compare similar cases before imposing a sentence outside the guidelines range, which would likely lead to inconsistent sentencing practices in regions throughout the state, is inconsistent with his position that courts should ensure uniform sentences.

[3] The majority explicitly states that a trial court "is not *required* to consider where a defendant's sentence falls on the sentencing range grid," and that appellate review is merely "aided" when a court compares its reasons for departure to facts describing a real or hypothetical crime meriting the same sentence. *Ante* at 309, 310.

> than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. *An abuse of discretion occurs*, however, *when the trial court chooses an outcome falling outside this principled range of outcomes*. [*Id.* at 269 (emphasis added; citations omitted).]

In *Babcock,* we thoroughly analyzed the distinct duties of the trial court and reviewing court. In rejecting de novo review and adopting the abuse of discretion standard, we observed: "Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case." *Id*. at 268. We further stated:

> The structure and content of the sentencing guidelines, as well as the organization of the appellate system itself, plainly reveal the Legislature's recognition that the trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case.
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> * * *
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> It is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation. [*Id.* at 267-268.]

The trial court's preeminence in the sentencing arena is reflected in the plain language of the statutory sentencing scheme, which provides that the court "may" depart from the appropriate range, MCL 769.34(3), and may even depart on the basis of an offense characteristic taken into account by the guidelines if the court concludes that the guidelines give it inadequate or dispro-

portionate weight, MCL 769.34(3)(b). *Babcock*, 469 Mich at 267-268. MCL 769.34(11) provides a basis for the appellate court's role:

> If, *upon a review of the record*, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter. [MCL 769.34(11) (emphasis added).]

Accordingly, an appellate court's task is to *review the record* to determine whether the facts support the departure. Remand for resentencing is warranted *only* if the record does not support the departure.[4]

The majority's current decision is inconsistent with MCL 769.34, *Babcock*, and *Fields*. The text of MCL 769.34(3) bears repeating:

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[4] I agree with the majority that "appellate courts may not review the record *to search for reasons to uphold a sentence that the trial court failed to justify.*" *Ante* at 314 n 50, citing *Babcock*, 469 Mich at 258-259. Rather, an appellate court reviews the record to determine whether the record supports the trial court's reasons for departure. My central point is that an appellate court's role is to *review the record* for an abuse of discretion, not to legally analyze the trial court's attempts to derive the departure from the guidelines or analogize it to other cases. Indeed, although Justice MARKMAN accuses me of promoting merely "rudimentary appellate review," *ante* at 322, my fear is that the majority's formula will promote incomplete scrutiny of departure sentences. Instead of carefully reviewing the entire record to determine whether a trial court's sentence falls outside the range of principled outcomes, under the majority's view an appellate court can restrict itself to the sentencing transcript to check for an adequate quantitative argument or comparison to other cases. By permitting appellate courts to restrict their review to the sentencing transcript and a comparison with other cases, rather than requiring a complete review of the facts as recounted in the entire record, the majority permits what resembles de novo review of a legal question, which we explicitly rejected for departure sentences in *Babcock* in favor of the abuse of discretion standard.

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. [MCL 769.34(3).]

Thus, the sentencing court is obligated to have "a substantial and compelling reason for that departure" and to "state[] on the record the reasons for departure." As I explained in my partial dissent to the *Babcock* decision, these are the sole elements that the statute requires to justify a departure sentence. *Babcock*, 469 Mich at 275 (CORRIGAN, J., dissenting in part). The *Babcock* majority went further than I would have, imposing a burden of articulation that is absent from the statute. See *id.*, part III(C), at 258-261. Significantly, however, even the majority agreed that "[a]lthough the trial court must articulate a substantial and compelling reason to justify its departure, *the trial court is not required to use any formulaic or 'magic' words in doing so*." *Id.* at 259 n 13 (emphasis added). Indeed, the majority explicitly counseled that the trial court *need not* "explain why it chose a twelve-month departure as opposed to an eleven-month departure (or indeed as opposed to any one of countless other potential departures)."[5] *Id.* at 260 n 14. Rather, "however it is articulated, the quality of the trial court's statement must be sufficient to allow for effective appellate review." *Id.* at

[5] I agree with Justice MARKMAN that "there is a considerable difference between a 16-year and a 30-year minimum sentence." *Ante* at 321. But, as *Babcock* explicitly counsels, a trial court is not required—and indeed may not be able—to precisely quantify the reasons for the precise departure sentence imposed. Still, in choosing not to impose such a requirement, the statutory scheme does not "essentially exempt . . . that part of a potential criminal sentence lying outside the guidelines range . . . from even rudimentary appellate review." *Ante* at 322. Record review of the reasons for departures is anything but rudimentary, as our work in this case itself most poignantly and painfully illustrates. Appel-

259 n 13. The current majority cites its decision in *Babcock* and claims: "We do not suggest that trial courts must sentence defendants with mathematical certainty." *Ante* at 311. Yet the majority now requires mathematical charting and magic words. In doing so, it abandons the abuse of discretion standard inherent in appellate courts' review of trial courts' sentencing decisions. Instead of acknowledging that there will always be a range of principled outcomes, the majority requires a trial court to impose sentences with precision and locate each sentence on an elusive scale of possible sentences for the underlying conviction. No longer must a reviewing court "proceed with a caution grounded in the inherent limitations of the appellate perspective." *Id*. at 270.

Requiring precise comparisons of sentences for different hypothetical crimes and offenders also establishes a task for trial courts that is both potentially impossible *and* unnecessary to limit their discretion or facilitate review. The Legislature affirmatively chose to limit trial courts' discretion by requiring them to articulate "substantial and compelling reasons." The phrase "substantial and compelling" had become a legal term of art which originated from this Court's definition in *Fields*. *Babcock*, 469 Mich at 257. *Fields* established—on the basis of definitions of the words "substantial" and "compelling"—that such reasons must " 'keenly' or 'irresistibly' grab our attention" and be " 'of considerable worth' in deciding the length of a sentence." *Fields*, 448 Mich at 67. Such reasons also must be "objective and verifiable." *Id.* at 68. Requiring reasons for departure to be objective and verifiable "maintain[s] the limited but moderating effect intended by the Legislature" in allowing for departures.

late courts are fully capable of fulfilling their task of reviewing the record to discern whether the facts support the departure as an appropriate exercise of discretion.

Id. The standard "allows judges to consider many of the factors traditionally utilized in formulating sentences" while "also provid[ing] sufficient restrictions to assure that the Legislature's intent . . . will not be subsumed by the use of what is intended to be an exception to the rule . . . ." *Id.* at 68-69. Thus, the standard itself embodies limits for departure that appellate courts are capable of reviewing. It is no accident, therefore, that the trial court need *only* articulate "substantial and compelling reasons" for a departure sentence to survive review under MCL 769.34(11) (resentencing is appropriate only if "the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range"). More is unnecessary because the range of substantial and compelling reasons is inherently limited. As I will explain further, this standard also reflects the potential impossibility of articulating reasons for a particular number of months or years of departure in any meaningful, reviewable way.

Although the majority calls for uniformity among departure sentences, *ante* at 311-312, 314, the majority cites no controlling statutory provision prescribing the methods it requires to achieve such uniformity. The majority cites only MCL 769.33(1)(e)(*iv*), which has been repealed. 2002 PA 31. Moreover, this repealed statutory provision merely provided direction to the Sentencing Commission regarding ways to modify the sentencing guidelines. It did not delineate a judge's duties in imposing a sentence outside of the guidelines. Further, although MCL 769.33(1)(e)(*iv*) provided that the Sentencing Commission should develop modifications to the sentencing guidelines that "[r]educe sentencing disparities," it did not require the standard of uniformity envisioned by the majority for sentences outside the guidelines range. Because of their unusual nature, departure sentences are not governed by the

general rule of uniformity applied to those more common offenses that fit within the mold of the guidelines. "Departure" is defined, in pertinent part, as "divergence or deviation, as from a standard or rule." *Random House Webster's College Dictionary* (2001). Thus, departure sentences should by definition be governed by a different standard than sentences within the guidelines range. By choosing to permit judges to "depart" from the guidelines range for unusual offenses, the Legislature contemplated a less stringent standard of uniformity for unusual offenses, which should because of their nature be treated differently.[6] Departure sentences generally involve less quantifiable[7] facts that are not adequately covered by the normative guidelines.[8] In *Babcock*, 469 Mich at 264, this Court ex-

[6] I agree with the majority that appellate courts should not impose a less stringent *standard of review* (i.e., abuse of discretion) on departure sentences, *ante* at 315 n 51, but I disagree that the Legislature intended to bind trial courts departing from the sentencing guidelines range to the standard of uniformity required for sentences within the guidelines.

[7] Justice MARKMAN argues that the facts in cases involving departure sentences are just as quantifiable as the facts in cases in which the sentence is within the guidelines. If the facts of a case are quantifiable, however, then they can be scored adequately by the offense and prior record variables, thus resulting in a sentence within the guidelines range. It is when objective and verifiable factors exist that cannot adequately be scored by the offense and prior record variables (i.e., they are not adequately quantifiable) that a departure sentence results. Thus departure sentences by their nature involve less quantifiable facts than sentences within the guidelines.

[8] Moreover, the majority does not acknowledge the extent to which the standards for departure sentences parallel those for guidelines sentences. The majority fears that my view would lead to "[a]ny arguably reasonable sentence [being] upheld." *Ante* at 314. I conclude that this is precisely what the Legislature intended for both departure sentences and nondeparture sentences. Departure sentences are constrained by the statutory maximum and the rule requiring that a minimum sentence not exceed 2/3 of the maximum, MCL 769.34(2)(b). Within this range, a departure sentence is reasonable if it is supported by a substantial and compelling reason. MCL

plained that a sentencing court departing from the guidelines range "must consider whether its sentence is proportionate to the seriousness of the *defendant's* conduct and *his* criminal history . . . ." (Emphasis added.) By effectively requiring sentencing courts to compare the defendant's conduct and criminal history to *other defendants'* conduct and criminal histories, the majority has created a standard of uniformity not required by statute or *Babcock*.

This case exemplifies the majority's mistake in requiring trial courts to offer burdensome articulations of their sentencing decisions mandated neither by MCL 769.34(3) nor precedent from this Court. The facts of this case clearly reveal that the 30-year minimum sentence imposed is within the range of principled outcomes. These facts also reinforce the *Babcock* Court's conclusion that "[t]he deference that is due [to the trial court under the abuse of discretion standard] is an acknowledgement of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Babcock*, 469 Mich at 270. The trial court's sentence is firmly rooted in the heinous nature of this case, in which the

769.34(3). Similarly, a nondeparture sentence is constrained by the minimum guidelines range. MCL 769.34(2). A sentence is presumptively reasonable if it falls within this range and must be affirmed. MCL 769.34(10). Thus, departure and nondeparture sentences are accorded appellate deference if they fall within the statutorily constrained parameters. Because a sentencing judge need not justify the exact nondeparture sentence he imposes within the minimum guidelines range, there is nothing novel about the Legislature's decision not to require quantification of a departure sentence that otherwise complies with the statutory constraints for departure sentences. Indeed, by requiring quantification of departure sentences, the majority erects a higher bar for departure sentences with regard to uniformity than exists for guidelines sentences themselves. This cannot be the correct result; by design, departure sentences are appropriate in cases that defy norms and do not easily lend themselves to common offense and offender characteristics.

child victim effectively became the sexual prisoner of her adult caretaker and landlord, who threatened to put the child's family out into the street if she did not submit to his abuse.

The single mother of the victim first met defendant and his wife when the little girl was just over one year old. The mother sought day care for her daughter and responded to an ad placed in the paper by defendant's wife. Several of his wife's ads were introduced at trial; she advertised her babysitting services[9] as a "mom away from home" in a "healthy," "experienced, loving, clean environment." Defendant's wife cared for the child in her home intermittently. The child and her younger sister later began staying with defendant and his wife (the Smiths) for long stretches, including over whole summers. The Smiths also took in the children for nine months when their mother was living in a halfway house.

The Smiths testified that the child was initially afraid of everyone or "afraid of men." But all the witnesses agreed that, over time, defendant and the child developed a father-daughter relationship. The child testified that she loved the Smiths, who sent her gifts and cards even when she was not in their care.[10] The Smiths testified that they began to think of the child as their own. Defendant, whom she sometimes called "daddy," was the only consistent male role model in her life.

Defendant molested the child over a 15-month period when she was nine and ten years old. The abuse began

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[9] Defendant's wife emphasized at trial that she did not operate a licensed day care business. She merely wanted to "baby-sit a couple of children."

[10] The child's mother frequently moved the family between Michigan and Georgia.

when she and her sister moved in with the Smiths during a summer while their mother was still living in Georgia and preparing to move the family back to Michigan. In the fall when she returned to Michigan, the mother, who was in financial straits, and her infant son also moved in with the Smiths at the request of defendant's wife but over defendant's objection. Defendant's abuse of the child continued when defendant's wife worked on her computer in the basement[11] and the

[11] Several witnesses confirmed the child's testimony that defendant's wife spent hours in her basement "office" using her computer during the evening. Defendant claimed, to the contrary, that he was with his wife "24 hours a day, seven days a week" because his wife was agoraphobic. Other points of the Smiths' testimony clearly belied this claim. For instance, they did not sleep in the same room; rather, they testified that she went to bed early and slept in their bedroom while he watched television and slept in the living room where the abuse took place. Defendant also denied that his wife had a computer in her basement office. His wife initially supported his testimony; she claimed that she used a laptop in the living room and not in the basement. She later conceded, however, that she used the computer at night in the basement.

These are but some examples of the apparent inconsistencies within and between defendant's testimony and that of his wife. The regular inconsistencies, as well as the couple's behavior at trial, shed light on the trial judge's observations at sentencing. For instance, the judge observed that in addition to sexually abusing the child who had come to utterly trust defendant, defendant then added to the child's ordeal by casting her as a liar at trial. In all, the child was subjected to two trials, and the judge opined that defendant and his wife attempted to spur a second mistrial by accusing the trial prosecutor of cocaine use during the lunch breaks. During the second trial, defendant's wife engaged in behavior that, after a hearing outside the jury's presence, the judge characterized as "stalking" the prosecutor. Defendant's wife made repeated calls to state police at the Downriver Area Narcotics Organization to lodge complaints against the prosecutor and encourage the officers to investigate. The officers stated that defendant's wife claimed to have followed the prosecutor in her car at lunch breaks during the trial (it is unclear from the transcript whether defendant, who was free on bond, was with her at these times). His wife reported the prosecutor's license plate number and claimed to have seen her using cocaine during the lunch breaks before returning to the courtroom. When called on by the judge to respond to the officers' statements, defendant's wife denied that she ever told them

child's mother was either at work or in her bedroom. When defendant and the child were alone in the living room watching television and the child was lying down on the couch, he would put his hand down her pants and use his fingers to penetrate and rub her genitals and anus. She testified that defendant's acts "hurt" and made her feel like her skin was "stretching." The child would leave the room when she could. She testified that she would attempt to move her body away from defendant's hand, but he would often stiffen his arm so she could not move.[12] On one occasion, defendant also rubbed himself and made a "wet spot" on his shorts. On this occasion, he told the child that he would "kick [her] family out" of the house if she told anyone about the abuse.

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that she followed the prosecutor or reported seeing her use cocaine and claimed that she only reported her suspicions of drug abuse because of the prosecutor's behavior in the courtroom. She claimed that she only wanted to get the prosecutor some help. Judge Kenny opined that the timing of her behavior indicated that, at a minimum, she hoped to cause embarrassment for the prosecutor during the trial and, likely, she hoped to cause the prosecutor's arrest and another mistrial. Judge Kenny clearly surmised that defendant was involved in some way with these attempts to malign the prosecutor; the judge ultimately revoked defendant's bond in an attempt to curb this disruptive and threatening behavior. The judge characterized the behavior exhibited by defendant's wife as "reprehensible," banned her from the courtroom, and encouraged the prosecutor to seek a personal protection order. He opined: "In 31 years . . . working in the criminal justice system, I have never seen anything . . . that stooped to the depth of effort to try to tamper with the integrity of this particular trial or trial process. The only thing that would be worse would be trying to shoot a witness or the prosecutor." Indeed, in keeping with the majority's approach despite my disagreement with it, on remand I would note that these events could have been considered under offense variable (OV) 19, which addresses interference with the administration of justice but which was not initially scored in this case. Arguably, even a score for OV 19 would not adequately account for the level of interference Judge Kenny found in this case.

[12] It is worth noting that, according to the record, defendant stands six feet and two inches tall and weighs between 290 and 311 pounds.

The child testified that she initially did not tell anyone what defendant was doing to her because she was too embarrassed, upset, and afraid of defendant's threats to evict her family. Ultimately, about a month after the last incident of abuse, she asked a friend's teenaged brother whether "he would ever hurt a little girl while they [sic] are sleeping." She then began sucking her thumb. Her behavior spurred him to ask her what was wrong. She revealed the abuse after asking him not to tell anyone her secret. The boy testified that, when she told him, he was "in complete shock." He could not sleep and concluded that he "couldn't live with [a secret] like that." The next morning, he convinced the victim to tell his mother and sister about the abuse.[13]

The boy's mother then reported the abuse to defendant's wife and the victim's mother. The victim told her mother that the allegations were true. As the victim's family gathered their things to immediately leave the Smiths' house, defendant's angry wife accused the victim's mother of lying and spat in her face. Defendant, whose wife had repeated the allegations to him, sat quietly in a chair throughout the ordeal. At trial, he testified that the child's allegations were untrue.

After leaving the Smiths' home, the child's mother called the police, who took the child's statement and advised her mother to take her to the hospital where she was examined for signs of sexual abuse. The child described the complete genital and anal exam as uncomfortable and embarrassing. The pediatric emergency room doctor who examined her testified that the child, who was then ten years old, reverted to thumbsucking during the exam process.

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[13] His mother described the victim as "crying and crying" and "shivering."

Defendant was charged with three counts of first-degree criminal sexual conduct involving the sexual penetration of a child under 13 years old. A brief review of the defense theory provides a useful background for the trial judge's later comments at the sentencing hearing. The defense initially stressed the questionable character of the victim's mother. Defense counsel noted an allegation made by defendant's wife that, after the preliminary examination in this case took place, someone who sounded like the victim's mother telephoned her and asked for $20,000 to make the case "go away."[14] Counsel

[14] Very little evidence of this purported call was presented at trial and defense counsel only mentioned it in passing during his closing argument. At the time of the call, defendant's wife did not file a report or contact the police officers investigating the case. Rather, she stated that she called a "dispatch" officer who she claimed told her to contact her phone company and have a tracer placed on her phone. A friend of the Smiths testified that she was at their home on the day of the call and that she recognized the voice of the victim's mother demanding money. She stated that defendant's wife had recognized the out-of-state number on her caller I.D. box and asked the friend to listen on the other line. No phone company reports or other direct evidence of the call were submitted into evidence. Indeed, the prosecutor argued that defendant's wife and her friend fabricated the call, particularly in light of the friend's convenient presence when the purported call was made, their failure to report it to the investigating officers, and their incredible claims that defendant's wife was told to put a "tracer" on the phone although the caller I.D. box purportedly showed the caller's phone number.

Further, there are obvious similarities between the accusations made by defendant's wife against the victim's mother and those she made against the prosecutor. Defendant's trials were rife with his wife's constant pattern of implausible accusations against participants in the case. Judge Kenny was in the best position to gauge any encouragement of her behavior by defendant. At a minimum, the record does not reveal any efforts by defendant to curb the behavior. I note these issues because her behavior formed part of the context of the trial and sentencing decisions, by their nature, " 'grow [] out of, and [are] bounded by, case-specific detailed factual circumstances.' " *Babcock*, 469 Mich at 268, quoting *Buford v United States,* 532 US 59, 65; 121 S Ct 1276; 149 L Ed 2d 197 (2001). To the extent that Judge

argued that the child's allegations "could be an imagined thing" and were like a "lie" or a "rumor." Counsel also argued that the ten-year-old victim may have made up the story in order to spend more time with her friend's teenaged brother, on whom she may have had a romantic crush. Counsel further suggested that the child did not appear traumatized because she continued to do well at school throughout the ordeal.

The jury found defendant guilty of each of the three counts of first-degree criminal sexual conduct. The trial judge imposed a departure sentence of 30 to 50 years' imprisonment for each count. Judge Kenny's full reasons for departure are recounted in the majority opinion, *ante* at 297-298. Judge Kenny stressed that the case "manifests the absolute worst type of exploitation." Over a period of 15 months defendant forced a child with no other adult males in her life, who was "fearful of the fact that she may lose the roof over her head for herself, her mother, and her two siblings," to "silently endure" repeated sexual penetrations. Judge Kenny also noted that the ordeal forced the young victim to undergo a "frightening gynecological type of examination certainly adding to the trauma in this particular case." Finally, defendant "blame[d] the child" and "categorize[d] her as a liar."

As the majority acknowledges, Judge Kenny thus identified objective and verifiable facts underlying his sentencing decision, each of which is supported by the record. *Ante* at 301-302. Contrary to some of the majority's conclusions, however, I conclude that the judge

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Kenny concluded defendant was complicit in his wife's acts, the record further supports the judge's observation at sentencing that, in addition to the incredibly exploitative abuse itself, defendant added to the child's ordeal by categorizing her as a liar. Indeed, defendant did so during two trials and, had his wife spurred a second mistrial, the child would have been forced to endure a third trial.

also did not abuse his discretion in deciding that these facts were substantial and compelling reasons to impose a 30-year departure sentence.[15]

First, I agree with the majority that Judge Kenny was not barred from relying on defendant's exploitation of his position as a caregiver to the child by MCL 769.34(3)(a), which prohibits a judge from departing on the basis of a defendant's lawful occupation. *Ante* at 298 n 3. Judge Kenny appropriately cited defendant's "cho[ice] to exploit [his] relationship" with the victim—or to abuse his status as a "child care provider"—as a reason for departure. Defendant preyed on a child to whom he became like a father—and who had no other men in her life to protect her—by taking advantage of his wife's solicitation of the child to their care by advertising a safe environment for children. By its terms, MCL 769.34(3)(a) could not apply to this case because defendant was *not* lawfully employed as a child care provider; indeed, he and his wife testified that he was rarely involved with her unlicensed babysitting services. But even if defendant had worked as a child care provider, his *exploitation* of that role—as opposed to the mere fact of his lawful occupation—would be a sound reason for departure.[16]

Second, I also agree with the majority's conclusion that the gynecological examination underwent by the 10-year-

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[15] Consistent with my dissent in *Babcock,* I would affirm defendant's sentences because Judge Kenny stated one or more substantial and compelling reasons for departure and the sentence imposed was not outside the range of principled outcomes. MCL 769.34(3) and (11) require no more in order for a departure sentence to survive appellate review. *Babcock*, 469 Mich at 274-277 (CORRIGAN, J., dissenting in part). But the sentence is also sound, and remand is not required, under the majority opinion in *Babcock*, as I will explain.

[16] MCL 769.34(3)(a) prohibits reliance on the mere fact of a defendant's occupation as a reason for departure. It reads in pertinent part: "The court shall not use an individual's . . . legal occupation . . . to depart from the appropriate sentence range."

old victim is a substantial and compelling reason to depart under the circumstances of this case. *Ante* at 302. This case involves a 10-year-old girl undergoing the first gynecological exam of her life under the auspices of criminal investigation. Further, the child's reversion to thumb-sucking during the embarrassing, uncomfortable exam was apparently a noteworthy fact in this case; the experienced pediatric emergency room doctor explicitly remembered this fact and remarked on it at trial. Under these circumstances, the trial judge reasonably concluded that the exam "add[ed] to the trauma in this particular case" and, therefore, was one of several factors that contributed to his decision to depart from the minimum guidelines.

I strongly disagree, however, with the majority's conclusion that the trial court's reasons did not justify the 30-year minimum sentence (in the language of MCL 769.34[3], "that departure") imposed. First, contrary to the majority's claim, *ante* at 302-303 n 21, the judge clearly stated that he departed in part on the basis of exploitation of the victim *because the level of exploitation here was not contemplated by the guidelines*. Offense variable (OV) 10 addresses predatory conduct, exploitation of a victim's age or size, and an offender's abuse of his position of authority or domestic relationship to complete a crime. MCL 777.40. MCL 769.34(3)(b) mandates:

> The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Here, the judge listed *numerous* forms of exploitation such as defendant's abuse of a father-daughter type relationship, the age of the child, the child's particular vul-

nerability because she had no other males in her life, and defendant's act of extorting her silence by threatening eviction of her whole family. The judge thus concluded that the case involved the "worst type of exploitation." After citing *Babcock* and commenting on these facts, Judge Kenny stated that "[t]hese are characteristics that I think don't get adequately get covered in the guidelines." Thus, the judge did exactly what MCL 769.34(3)(b) and *Babcock* require; he explained that the OVs did not give adequate weight to the exploitation involved in this case. See *Babcock*, 469 Mich at 258 n 12. I see absolutely no justification in MCL 769.34 or *Babcock* for the majority's conclusion that the judge was also required to *explicitly* mention OV 10 in order to support his explanation. Rather, as required by statute, he stated that the offense "*characteristic* [of exploitation] has been given inadequate or disproportionate weight" by the guidelines. MCL 769.34(3)(b) (emphasis added). Even if it were necessary to name a particular OV, he referenced OV 10 in an obvious manner because that OV is entitled "exploitation of a vulnerable victim." MCL 777.40(1). Thus, I fail to understand how the majority is "unable to ascertain whether he believed the factor was given inadequate weight." *Ante* at 303 n 21. Moreover, I find it hard to believe that Judge Kenny may have "failed to recognize that the guidelines consider exploitation," *ante* at 303 n 21, not only because he is an experienced trial judge but because he acknowledged the guidelines range in this case as scored by the Department of Corrections; the score plainly included 10 points for OV 10. Requiring more of a trial judge here amounts to mandating the very sort of "magic" words that *Babcock* purported not to require. *Babcock*, 469 Mich at 259 n 13. It also runs counter to the majority's current claim that "precise" words are not "necessary . . . to justify a particular departure." *Ante* at 311, citing *Babcock* at 259 n 13.

In sum, I agree with the Court of Appeals panel that 30-year sentences are well within the range of principled outcomes for these heinous acts of abuse.[17] The

[17] Because of the timing of this case, we also happen to have a unique window onto whether our Legislature would conclude that a 30-year sentence is within the range of principled outcomes under these circumstances. Effective July 1, 2008, an adult who rapes a child, i.e., commits first-degree criminal sexual conduct against a child less than 13 years of age, *must* be imprisoned for a minimum term of *at least* 25 years. Such an offender is also still eligible for a life sentence. MCL 750.520b(2)(b), as amended by 2007 PA 163. Thus, if defendant had committed these offenses at a later date, he would be *required* to serve a minimum sentence of 25 years or more. Moreover, the 25-year sentence would be mandatory even if there were *no* substantial and compelling reasons to depart upward. Judge Kenny's reasons for departure would certainly justify a 30-year minimum sentence (a mere increase of five years from the mandatory minimum) under the new scheme.

Further, on a national scale, a debate continues regarding whether capital punishment is an appropriate sentence for child rape. The United States Supreme Court recently struck down a statute providing for such punishment when the crime is not also intended to kill the child. *Kennedy v Louisiana,* ___ US ___; 128 S Ct 2641; 171 L Ed 2d 525 (2008). But, as Justice Alito observed in dissent, six states currently permit capital punishment for child rape convictions. *Id*., ___ US at ___; 128 S Ct at 2665 (Alito, J., dissenting). Justice Alito also reasonably questions the *Kennedy* plurality's conclusion that there is genuinely a "national consensus" that capital punishment is inappropriate in such cases. *Id*. Moreover, although Justice Kennedy's lead opinion also cited the absence of capital punishment as a sanction for child rape in the context of federal criminal law, *id*., ___ US at ___; 128 S Ct at 2652, the Department of Justice belatedly observed that the Court was mistaken in this regard; the rape of a child is a capital offense under the law of the United States Military. See Linda Greenhouse, *Justice Department Admits Error in Not Briefing Court,* N.Y. Times, July 3, 2008 <http://www.nytimes.com/2008/07/03/us/03scotus.html> (accessed July 29, 2008). Justice Alito observed:

> [T]here are many indications of growing alarm about the sexual abuse of children. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2000 ed. and Supp. V), which requires States receiving certain federal funds to establish registration systems for convicted sex offenders and to notify the public about persons convicted of the sexual abuse of minors. All

trial judge's stated reasons adequately justify the departure and are sufficient for appellate review. Unlike the majority, it is not "unclear" to me "why a minimum sentence of 30 years' imprisonment is warranted for this defendant." *Ante* at 319. To the contrary, the record clearly supports the departure. The majority asserts that I "fail[] to identify where in the record the judge justified the *particular* departure imposed," and that I "cannot identify it because the trial judge failed to provide it." *Ante* at 312. Such comments exemplify the majority's incorrect reading of the statute and what it requires of the record for a departure sentence to survive review. The trial court is not required to state on the record with precision his reasons for the exact number of months or years he departs above the guidelines range. Rather, *the record must support the departure*. MCL 769.34(11) clearly requires the review-

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50 States have now enacted such statutes. In addition, at least 21 States and the District of Columbia now have statutes permitting the involuntary commitment of sexual predators, and at least 12 States have enacted residency restrictions for sex offenders. [*Id*., ___ US at ___; 128 S Ct at 2669-2671 (Alito, J., dissenting).]

He offered the following grim statistics:

> From 1976 to 1986, the number of reported cases of child sexual abuse grew from 6,000 to 132,000, an increase of 2,100%. A. Lurigio, M. Jones, & B. Smith, Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice, 59 Sep Fed. Probation 69 (1995). By 1991, the number of cases totaled 432,000, an increase of another 227%. *Ibid*. In 1995, local child protection services agencies identified 126,000 children who were victims of either substantiated or indicated sexual abuse. Nearly 30% of those child victims were between the age of four and seven. Rape, Abuse & Incest National Network Statistics, online at http://www.rainn.org/get-information/statistics/sexual-assault-victims. There were an estimated 90,000 substantiated cases of child sexual abuse in 2003. Crimes Against Children Research Center, Reports from the States to the National Child Abuse and Neglect Data System, available at www.unh.edu/ccrc/sexual-abuse/Child%Sexual%Abuse.pdf. [*Id*., ___ US at ___; 128 S Ct at 2669 n 2.]

ing court to "review . . . the record" in order to evaluate whether "the trial court did not have a substantial and compelling reason for departing." But, instead of reviewing the record to determine whether the facts justify the departure imposed, the majority searches for statements quantifying the extent of departure. Despite its claims to the contrary, the majority requires a sentencing court to provide a quantitative analysis of how a particular departure relates to the offense variables, prior record variables, and sentencing grid. Such an explanation by the sentencing court *may* be helpful to justify a departure in a particular case or to facilitate appellate review. But this sort of detailed justification is not *required* by the Legislature's statutory scheme, which *only* requires a court to "ha[ve] a substantial and compelling reason for that departure and state[] on the record the reasons for departure." MCL 769.34(3).[18]

[18] This Court consistently and rightly criticizes such deviations from the Legislature's intent as expressed in its unambiguous statutory text. For a prime example, this Court rejected courts' attempts to superimpose atextual, judicially created rules on unambiguous text in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), and *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). *Devillers* and *Rory* addressed the line of cases beginning with *Tom Thomas Org, Inc v Reliance Ins Co,* 396 Mich 588; 242 NW2d 396 (1976), in which courts allowed for judicial tolling of unambiguous time periods established by statute and contract. *Devillers* overruled *Lewis v DAIIE,* 426 Mich 93; 393 NW2d 167 (1986), because *Lewis* impermissibly grafted a judicial tolling doctrine onto a provision of the no-fault act, MCL 500.3145(1), that plainly afforded claimants one year from the time a loss was incurred to recover benefits. *Devillers* at 581. In doing so, *Devillers* "reaffirm[ed] the Legislature's prerogative to set policy and our long-established commitment to the application of statutes according to their plain and unambiguous terms to preserve that legislative prerogative." *Id*. Indeed, we appropriately characterized the *Lewis* Court's superimposition of judicial tolling on the unambiguous statute as "crafting its own amendment" of the statute. *Id.* at 582. In *Rory,* we similarly overruled the attempts of *Tom Thomas* and its progeny to "abrogate unambiguous contractual terms" using "judicial assessment[s] of 'reasonableness.' " *Rory* at 470.

Indeed, the majority today creates a corollary guidelines scheme for departure sentences from whole cloth and imports it through a single word—"that"—in MCL 769.34(3) ("*that* departure").

The nature of the requirements of the plain text of the statutes, which the majority's holding ignores, reflects the fact that the Legislature continues to grant sentencing discretion to trial courts, even in the wake of legislatively enacted sentencing guidelines, because each case is unique and only the trial judge is directly familiar with the facts and circumstances of the offense and offender. See *Babcock*, 469 Mich at 270. They also reflect the difficulty of quantifying individualized sentences.

The United States Supreme Court recently provided guidance concerning how appellate courts may meaningfully review sentencing decisions while preserving trial courts' sentencing discretion in *Gall v United States*, 552 US ___; 128 S Ct 586; 169 L Ed 2d 445 (2007). Although the federal sentencing guidelines differ from the Michigan scheme and are no longer mandatory, federal judges must

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Thus, in both cases we recognized that we lack the power to import our own enhancements or exceptions when the Legislature or contracting parties have clearly established a governing regime.

The statutory requirements for imposing and reviewing departure sentences that we address here are equally clear. The *Tom Thomas* line of cases permitted judicial tolling to thwart the clear time periods circumscribing parties' duties and rights as established by contract or statute. Here, the Legislature clearly circumscribes a court's sentencing duties by requiring it to articulate substantial and compelling reasons to depart. And it further directs that appellate review of the departure is done by analyzing the record, not charting a defendant's placement on a continuum. Yet the majority expands these clearly defined duties by imposing judicially created guidelines for departure. By doing so, the majority fails to recognize that this Court's duty is to apply the statutory language "without addition, subtraction, or modification." *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002). "We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.*

consult the guidelines and, as in Michigan, a departure from the specified range is reviewed for an abuse of discretion. *Id*. at ___; 128 S Ct at 594. Appellate courts defer to trial courts' sentencing discretion in part due to practical considerations. As the *Gall* Court observed:

> "The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Brief for Federal Public and Community Defenders et al. as *Amici Curiae* 16. "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court." *Rita* [*v United States*, ___ US __; 127 S Ct 2456, 2469; 168 L Ed 2d 203 (2007)]. Moreover, "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do." *Koon v. United States,* 518 U.S. 81, 98, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). [*Id*. at ___; 128 S Ct at 597-598.]

While acknowledging that "appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines," the *Gall* Court "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Gall*, 552 US at ___; 128 S Ct at 595. Most significant to our purposes, the Court observed that mathematical approaches "assume[] the existence of some ascertainable method of assigning percentages to various justifications." *Id*. at ___; 128 S Ct at 596. "The [percentage] formula is a classic example of attempting to measure an inventory of apples by counting oranges." *Id.*

I fear that the majority today similarly attempts to measure apples by counting oranges. Although rooting a departure sentence in the factors considered by the

Michigan sentencing guidelines may be helpful in a given case, it will often be antithetical to courts' ability to exercise their sentencing discretion. For instance, how can a trial or appellate court measure the extent of departure appropriate for the level of exploitation present in this case? Should defendant's act of extorting silence from the child—in the words of the majority, of "forc[ing] the child to choose between reporting the defendant's repeated criminal assaults and protecting her family from homelessness," *ante* at 301—be weighed at twice the maximum score for OV 10? Ten times that score? I agree with the majority that proportionality is in part rooted in the egregiousness of the offense, *ante* at 305, quoting *Babcock* at 263, and therefore that relatively higher sentences will be warranted for offenders with lower prior record variable scores whose egregious crimes nonetheless are not adequately contemplated by the OV scores, *ante* at 308. But I fail to see how Judge Kenny fell short in his obligation to "comply *reasonably* with [his] obligations under the guidelines," *ante* at 319, when he explained in detail his reasons for concluding that this defendant is precisely such an offender.

Indeed, complying with the majority's regime will be essentially impossible in the many cases where trial courts depart on the basis of unique characteristics that are not contemplated by the guidelines at all and not present for comparison in other cases. I respectfully suggest that here Judge Kenny could do no more than point to the record of this heinous case of abuse to explain his reasons for departing under these unique circumstances. No amount of charting the offense by reference to the guidelines would reveal a correct departure sentence or departure range because we cannot quantify the circumstances of this crime or the exploitation involved. Individualized sentencing often simply

is not amenable to this level of precision and further articulation by the trial court would not meaningfully aid in review.[19] As stated by *Fields* and reflected in MCL 769.34(11), the requirement that a trial court state attention-grabbing, objective and verifiable reasons for departure *itself* "provides sufficient restrictions to assure that the Legislature's intent . . . will not be subsumed by the use of what is intended to be an exception to the rule . . . ." *Fields*, 448 Mich at 68-69.

To the extent the majority asserts that its regime is necessary to facilitate proportionality, it appears to ignore that the *Babcock* decision thoroughly considered the goal of proportionality when it established abuse of discretion as the appropriate standard for review of sentencing departures. *Ante* at 304-305; *Babcock*, 469 Mich at 261-264. In *Gall,* the United States Supreme Court approved of its decision in *Koon* to adopt an abuse

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[19] In his partial dissent from the *Babcock* decision, Justice CAVANAGH similarly stressed the futility of imposing artificial limitations on a trial judge's discretionary sentencing decisions, albeit by *rejecting* the majority's conclusion that reasons for departure must be objective and verifiable and suggesting an even more deferential approach. *Babcock*, 469 Mich at 279 (CAVANAGH, J., dissenting in part). Justice CAVANAGH observed:

> [W]hat rises to the level of substantial and compelling is clearly subjective. "It relates to *this* defendant and to *this* sentencing judge, who is examining *this* individual and *this* offense." [*Fields,* 448 Mich at 104 (CAVANAGH, J., dissenting)] (emphasis in original). Thus, the weighing of all the factors and circumstances before the sentencing court includes inherently subjective inquiries.
>
> Further, . . . [t]here are certain factors, such as a defendant's remorse or a defendant's family support, that may be considered objective by one sentencing judge and subjective by another. The dissent in *Fields* stated, "[t]he better test is whether the sentencing judge is satisfied that the nature and extent of the defendant's remorse [or family support] are substantial and compelling reasons to support a sentencing departure." *Id*. at 105. I remain committed to the position that the "objective" criteria utilized by this Court is [sic] unworkable. [*Id.* at 279-280.]

of discretion standard of review. The *Gall* Court observed: "Even [in *Koon*] we were satisfied that a more deferential *abuse-of-discretion standard could successfully balance the need to 'reduce unjustified disparities*' across the Nation and 'consider every convicted person as an individual.' " *Gall*, 552 US at ___; 128 S Ct at 598 n 8, quoting *Koon,* 518 US 113 (emphasis added).

Contrary to the majority's approach, Michigan law—like federal law—requires simply that a trial court "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 US at ___; 128 S Ct at 597; see also *Babcock* at 259 n 13 ("[H]owever it is articulated, the quality of the trial court's statement must be sufficient to allow for effective appellate review."). Because of the intangible nature of sentencing factors, adequate explanation is all we can ask of trial courts. Here Judge Kenny complied with the requirements of MCL 769.34(3) by stating his intention to depart and his reasons for departure. He complied with MCL 759.34(3)(b) by explaining that the guidelines did not adequately cover the circumstances of the offenses. He aided appellate review by explaining his reasons for departure in detail and explicitly recognizing his duties under *Babcock*. By requiring still more from trial judges, the majority now imposes an unreasonably burdensome task on parties and judges, who will be required to debate the specific degree to which the guidelines are over- or under-inclusive of particular factors and quantify the effect of factors not addressed by the guidelines. Yet, because these issues are not easily quantifiable, appellate courts will remain able only to answer the central questions: does the record reflect that the trial court had a substantial and compelling reason to depart and, if so, was the sentence outside the range of principled outcomes? MCL

769.34(11); *Babcock*, 469 Mich at 269. The majority thus assigns litigants and trial judges a time-consuming and potentially impossible task that is irrelevant to the statutory directives concerning a trial judge's substantial and compelling reasons for departure.

I would retain the current, workable standard. As in the federal context, an appellate court

> may consider the extent of the deviation [from the guidelines], but must give due deference to the [trial] court's decision that the [sentencing] factors, *on a whole,* justify the extent of the variance. *The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal* . . . . [*Gall*, 552 US at ___; 128 S Ct at 597 (emphasis added).]

This prohibition on an appellate court substituting its judgment for that of the trial court constitutes the very heart of the abuse of discretion standard of review. Because the sentences imposed fall within the range of reasonable opinions regarding what sentences are appropriate in this case, they do not constitute an abuse of discretion. Accordingly, I would affirm defendant's sentences.

In re HULTGREN

Docket No. 136880. Argued October 2, 2008 (Calendar No. 8). Decided December 17, 2008.

The Judicial Tenure Commission (JTC) filed a formal complaint against Judge William C. Hultgren of the 19th District Court, alleging several violations of judicial conduct standards contained in the Michigan Constitution, the Michigan Court Rules, and the Michigan Code of Judicial Conduct in connection with his involvement in a debt-collection proceeding assigned to another judge. The respondent became involved at the behest of an acquaintance whose business partner's cousin, Hussein Dabaja, the defendant in the case, claimed to be the victim of mistaken identity and required assistance because of his limited English skills. The Supreme Court appointed retired District Judge Norma Y. Dotson-Sales to act as master. After a formal hearing, Judge Dotson-Sales concluded that the charges contained in the JTC's complaint were not proven by a preponderance of the evidence and that the respondent's conduct did not violate the relevant provisions of the Michigan Constitution, the Michigan Court Rules, or the Michigan Code of Judicial Conduct. The JTC, however, disagreed, concluding that the respondent's conduct violated Const 1963, art 6, § 30; MCR 9.104(A)(1) through (4); MCR 9.205; and Canons 1, 2A, and 2C of the Code of Judicial Conduct. A majority of the JTC recommended that the Supreme Court publicly censure the respondent and suspend him from exercising his judicial duties for 60 days without pay.

In an opinion by Justice CAVANAGH, joined by Justices WEAVER, CORRIGAN, and MARKMAN, the Supreme Court *held*:

The respondent's actions do not constitute judicial misconduct. The recommendation of the JTC is rejected and the master's findings of fact and conclusions of law are adopted. However, the respondent's actions under the circumstances reflected poor judgment, as he himself acknowledged. The respondent is therefore cautioned to more carefully conform his actions to the rules and provisions that guide judicial conduct.

Recommendation rejected.

Justice YOUNG, joined by Chief Justice TAYLOR and Justice KELLY, concurring in part and dissenting in part, agreed that the

respondent's actions do not merit the 60-day suspension recommended by the JTC, but would hold that the respondent's use of the prestige of his office to advance the interests of Hussein Dabaja violated Canon 2C of the Code of Judicial Conduct, and that an admonition is an adequate sanction under the circumstances.

Paul J. Fischer and *Casimir J. Swastek* for the Judicial Tenure Commission.

Philip J. Thomas for William C. Hultgren.

CAVANAGH, J. The Judicial Tenure Commission (JTC) recommended that this Court sanction respondent, 19th District Court Judge William C. Hultgren, with public censure and 60 days' suspension without pay for judicial misconduct. After considering respondent's actions, we conclude that they do not constitute judicial misconduct.

On July 10, 2007, the JTC filed Formal Complaint No. 82, alleging that respondent had committed judicial misconduct in violation of Const 1963, art 6, § 30; MCR 9.104 and MCR 9.205; and the Michigan Code of Judicial Conduct (MCJC), Canons 1, 2A, and 2C.[1] This Court

[1] Const 1963, art 6, § 30, states in part:

(2) On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for . . . misconduct in office . . . or conduct that is clearly prejudicial to the administration of justice.

MCR 9.104 states in part:

(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court[.]

MCR 9.205 states in part:

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for . . . misconduct in office . . . or conduct that is clearly prejudicial to the administration of justice. . . .

(1) Misconduct in office includes, but is not limited to:

* * *

(e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another . . . .

* * *

(2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge, whether the conduct occurred before or after the respondent became a judge or was related to judicial office.

Canon 1 of the Code of Judicial Conduct states in part:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. . . .

Canon 2 of the Code of Judicial Conduct states in part:

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. . . .

* * *

appointed the Honorable Norma Dotson-Sales as the master to hear the case. The master's report, issued on March 31, 2008, states the factual background:

> 1. Respondent is and has been a sitting 19th District Court Judge for approximately 15 years.
>
> 2. On October 13, 2006, a caller identified as Ali Beydoun, telephoned Respondent's office and requested a 15 minute appointment.
>
> 3. On October 16, 2006, Respondent held a meeting in his court chambers, for approximately 15 minutes, with Ali (a/k/a Wally) Beydoun and two (2) other men: Hussein Dabaja and Frank Dabaja (Hussein's cousin).
>
> 4.Prior to October 16, 2006, Respondent had a casual relationship with Wally Beydoun and did not know the Dabaja cousins.
>
> 5. During the October 16th meeting, it became apparent that Hussein Dabaja ("Hussein") had difficulty with the English language and that Frank Dabaja ("Frank") apparently attended the meeting to act as a translator for his cousin.
>
> 6. Hussein, through Frank, claimed that he was a victim of mistaken identify [sic] regarding a credit card debt that occurred before his entry into the USA. He presented Respondent with documentation to support his claim. Said documentation included a passport and social security card.
>
> 7. Respondent requested his secretary, Miss Hunt, to search the court computer system (i.e., Court Case Register of Actions) for any cases involving Hussein Dabaja. The court screen displayed a case titled: *Asset Acceptance Cor-*

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. . . .

poration v Hussein Dabaja ("*Asset Acceptance*") which was assigned to 19th District Judge Mark W. Somers and marked "Closed."

8. The Court Case Register of Actions also indicated that Plaintiff in the pending matter was represented by [attorney] Thomas D. Hocking.

9. Respondent telephoned Atty. Hocking's office, spoke with Ms. Danielle Groppi, Mr. Hocking's litigation secretary, and caused a letter and the documents presented to him by Hussein Dabaja to be faxed to Atty. Hocking. The letter was written on Respondent's official 19th District Court stationery.

10. Respondent had no further contact with the three men and no contact with the Asset Acceptance matter until he received two (2) memos, dated December 14, 2006 and January 2, 2007, from Judge Somers.

11. Respondent had no discussions with Judge Somers regarding the Hussein Dabaja matter until his receipt of the above two (2) memos from Judge Somers.

12. On January 3, 2007, Respondent sent a requested reply to Judge Somers.

13. Formal Complaint No. 82 was filed on July 10, 2007.

The master's report included the following findings of fact:

1. The relationship between the Respondent and Ali Beydoun, at best, was that of "acquaintances."

2. On October 16, 2006, there was no social, business or other relationship between the Respondent and Hussein Dabaja and Frank Dabaja.

3. Respondent'[s] October 16, 2006, meeting with his constituents was not misconduct.

4. Respondent used poor judgment when he failed to terminate the October 16th meeting once he discovered that the subject matter was assigned to another judge.

5. The October 16th meeting was not an ex parte communication violation.

6. Respondent's telephone call to Atty. Hocking's office was not misconduct.

7. Respondent's actions in writing the Oct. 16th letter were not that of an intervener. Rather, he acted as a conduit to prevent a miscarriage of justice.

8. Respondent's use of the words "a lawyer in a credit card collection mill" was not misconduct.

The master also made the following conclusions of law:

1. The charges contained in Formal Complaint No. 82 were not proven by a preponderance of the evidence.

2. Respondent's conduct in Formal Complaint No. 82 did not constitute [a] violation of the Michigan Constitution, 1963, as amended, Article 6, Section 30; MCR 9.104; MCR 9.205; or the Code of Judicial Conduct, Canons 1, 2A, 2C, or 3A.

After a public hearing, the JTC rejected the master's conclusions of law. It concluded that the facts established at the hearing demonstrated that respondent had committed judicial misconduct under all counts of the complaint. It recommended that respondent be sanctioned by public censure and 60 days' suspension without pay.[2]

MCR 9.225 states, in part, that this Court "shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission . . . ." Having reviewed the record in this case, we reject the recommendation of the JTC and adopt the findings of fact and conclusions of law of the master. In our judgment, respondent has not committed judicial misconduct. We

[2] Two members of the nine-member JTC panel concurred with the majority's findings of fact and conclusions of law, but dissented from the recommended sanction. They believed that respondent should be sanctioned by public censure and a one-year suspension without pay.

also agree with the master, however, that respondent's actions under the circumstances reflected poor judgment. Respondent acknowledged this conclusion at the hearing before the master. Accordingly, we caution respondent to more carefully conform his actions to the rules and provisions that guide judicial conduct.

WEAVER, CORRIGAN, and MARKMAN, JJ., concurred with CAVANAGH, J.

YOUNG, J. (*concurring in part and dissenting in part*). I concur with the majority that the respondent's actions in this case do not merit the 60-day suspension recommended by the Judicial Tenure Commission. Under the circumstances, the respondent's actions merit no more than an admonition. However, I disagree with and dissent from the majority's conclusion that respondent's actions did not constitute judicial misconduct. I believe that the respondent's actions constituted a clear violation of Canon 2C, as respondent *unquestionably* used the prestige of his office to advance the interests of Hussein Dabaja. Respondent contacted, both by telephone and in writing, the attorney executing a collection judgment against Hussein Dabaja, each time identifying himself as a judge of the 19th District Court.

The facts of this case are compelling, and it is easy to understand why a judge might choose to become involved to prevent what clearly appeared to be a case of mistaken identity and a miscarriage of justice. Hussein Dabaja, along with two other men, came to respondent's office seeking respondent's assistance. A default judgment had been entered against Dabaja, an immi-

grant who spoke very little English, for a debt that plainly belonged to another man who shared the identical name.[3]

When respondent asked his secretary to locate the case, the computer entry indicated that a default judgment had been entered against Hussein Dabaja seven years earlier and that the case was currently closed. In his brief, respondent claims that because the computer indicated that the file was closed, respondent had "no indication that any post-judgment proceedings had been reinitiated against Hussein Dabaja."

However, I believe that the mere presence of three men appearing in his office seeking respondent's assistance for a "closed" file should have put respondent on notice that *some* type of postjudgment proceeding might have been in progress.[4] In fact, respondent's letter to Attorney Hocking, the attorney prosecuting the collection action against Hussein Dabaja, indicates respondent's *actual* awareness that collection efforts were underway. In his letter to the collection attorney, respondent stated that "[t]he Hussein A. Dabaja that *is being pursued for collection purposes* has a different

[3] The debt for medical equipment was incurred in 1986, two years before Hussein Dabaja immigrated to the United States. Moreover, Hussein Dabaja had a different social security number, different birthdate, and different maternal name than the debtor.

[4] Indeed, collection proceedings occurred contemporaneously with respondent's correspondence with attorney Thomas D. Hocking. In a 2008 hearing to set aside the 1999 default judgment, Judge Mark W. Somers indicated that an order of judgment was signed by the court in August 2006 against Hussein Dabaja and his business, H & G Marathon. Two separate requests and orders to seize property from Hussein Dabaja and his business were signed by the court at the end of September 2006. Hussein Dabaja filed objections to the garnishments on November 16, 2006, and those objections were denied by the court on December 8, 2006. Respondent's correspondence to Attorney Hocking was dated October 16, 2006.

mother than the Hussein A. Dabaja that actually incurred the debt." Thus, while the fact that respondent inquired into the status of the case and it was listed as "closed" in the court's computer records is a mitigating factor, that factor is undercut by the circumstances of the case, as well as respondent's letter.

The second sentence of Canon 2C is quite clear, and contains no exceptions or exclusions: "A judge should not use the prestige of office to advance personal business interests or those of others." Respondent intervened twice on behalf of Hussein Dabaja, both times in his capacity as a judge. I conclude that respondent's actions constituted judicial misconduct under the plain language of the canon. That respondent was acting to prevent a miscarriage of justice is a mitigating factor to be considered when formulating the appropriate *sanction*, but it simply does not excuse respondent's frank noncompliance with the Michigan Code of Judicial Conduct.

While few judges would be unmoved by the miscarriage of justice revealed to respondent, Canon 2C was drafted with an understanding of the coercion inherent in the advocacy of a judge intervening *as a judge* on behalf of another. It is for this reason that the canon states that a judge "should not use the prestige of office to advance personal business interests or those of others." The majority gives no meaning to this injunction, and, in so doing, eliminates the bright line of ethical behavior set forth in Canon 2C. As I believe the canon states a sensible restriction on "judicial advocacy"—a term that is oxymoronic—the canon should be consistently enforced for the protection of the public and as a reminder to judges that they cannot be advocates for the personal business interests of others, even for worthy causes.

Under the majority's formulation, which concludes that no judicial misconduct occurred, a sufficiently compelling reason for using the prestige of judicial office to advance the business interests of others apparently amounts to no violation at all. Because the majority concludes that respondent's actions did not constitute judicial misconduct, I dissent. I concur, however, with the majority's rejection of the 60-day suspension recommended by the Judicial Tenure Commission. I believe that an admonition is an adequate sanction under the facts of this case.

TAYLOR, C.J., and KELLY, J., concurred with YOUNG, J.

PEOPLE v TAYLOR
PEOPLE v KING
PEOPLE v SCARBER

Docket Nos. 135666, 135683, and 135692. Decided December 19, 2008.

Eric Taylor, Robert L. King, and Marlon Scarber were convicted in the Wayne Circuit Court, Annette J. Berry, J., of multiple crimes in connection with the kidnapping and murder of Fate Washington. Taylor and King were convicted by the same jury, while Scarber was given a separate jury so that Scarber's out-of-court statements to a friend, in which Scarber described the circumstances of the crimes and identified King as Washington's killer, could be placed into evidence. All three defendants appealed. After consolidating the cases, the Court of Appeals, ZAHRA, P.J., and WHITE and O'CONNELL, JJ., set aside, on double-jeopardy grounds, King's convictions and sentences for second-degree murder and kidnapping and Taylor's conviction and sentence for kidnapping. The Court affirmed all the other convictions and sentences. Specifically, the Court rejected King's argument that the trial court erred by failing to consider the reliability of Scarber's out-of-court statements before ruling that their admission would not violate King's right of confrontation, notwithstanding the fact that King could not cross-examine Scarber about the statements. The Court held that the statements in question were admissible under the hearsay exception for statements against the declarant's penal interest, MRE 804(b)(3), and that the statements bore sufficient indicia of reliability under the analysis in *People v Poole*, 444 Mich 151 (1993), to avoid violating King's right of confrontation. Unpublished opinion per curiam of the Court of Appeals, issued November 29, 2007 (Docket Nos. 273443, 273543, and 273955). The defendants sought leave to appeal in the Supreme Court.

In lieu of granting leave to appeal, in an opinion per curiam signed by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

Insofar as *People v Poole*, 444 Mich 151 (1993), held that the admissibility of a codefendant's nontestimonial hearsay statement is governed by both MRE 804(b)(3) and the Confrontation Clause

of the United States Constitution, it is no longer good law. The admissibility of nontestimonial hearsay is governed solely by MRE 804(b)(3).

1. The portion of *Poole* pertaining to the requirements of the Confrontation Clause is no longer good law because it was premised on *Ohio v Roberts*, 448 US 56 (1980), which has been overruled by *Crawford v Washington*, 541 US 36 (2004), and *Davis v Washington*, 547 US 813 (2006). *Crawford* held that, where testimonial evidence is at issue, the Confrontation Clause requires the unavailability of the declarant and a prior opportunity for cross-examination. Under *Davis*, evidence that is nontestimonial is subject to traditional rules limiting the admissibility of hearsay, but does not implicate the Confrontation Clause.

2. The codefendant made the challenged hearsay statements informally to an acquaintance, not during a police interrogation or other formal proceeding. Accordingly, the statements were nontestimonial, and their admission is governed solely by MRE 804(b)(3). Although the Court of Appeals engaged in a Confrontation Clause analysis, it reached the correct result by sufficiently addressing the issue of the statements' admissibility under MRE 804(b)(3).

Affirmed.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part, agreed that *Poole* is no longer controlling law to the extent it relied on *Roberts*, but would grant leave to reconsider the validity of *Poole* in light of the United States Supreme Court's decision in *Williamson v United States*, 512 US 594 (1994), which held that the federal counterpart of MRE 804(b)(3) does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory, and particularly if the statement implicates someone else.

EVIDENCE — HEARSAY — STATEMENTS AGAINST INTEREST — INCULPATION OF ACCOMPLICES — CONFRONTATION OF WITNESSES — RIGHT OF CONFRONTATION.

The admissibility of nontestimonial hearsay is governed solely by MRE 804(b)(3) and does not implicate a defendant's constitutional right to confront witnesses (US Const, Am VI; MRE 804[b][3]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

Eric Taylor, *in propria persona*.

PER CURIAM. In this case, two juries convicted three defendants of multiple crimes related to the kidnapping and murder of Fate Washington. Defendant Robert L. King argues that the inculpatory statements of codefendant Marlon Scarber, admitted through the testimony of an acquaintance, violated the rules of evidence and King's right of confrontation under *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993). In lieu of granting leave to appeal, we hold that, insofar as *Poole* held that the admissibility of a codefendant's nontestimonial hearsay statement is governed by *both* MRE 804(b)(3) and the Confrontation Clause of the United States Constitution, it is no longer good law. We nevertheless affirm the decision of the Court of Appeals because we conclude that the Court sufficiently addressed the issue of the statements' admissibility under MRE 804(b)(3). We deny defendants' applications for leave to appeal in all other respects.

I. FACTS AND PROCEDURAL HISTORY

The Court of Appeals summarized the facts of this case as follows:

> The victim, Fate Washington, was sitting in the driver's-side seat of his Ford Expedition on the street outside his house. He had just finished speaking with a neighbor when defendant Scarber and an unidentified man, both clad in black, approached the vehicle and forced Washington, at gunpoint, further into the vehicle. Both the neighbor and Washington's adult son, who was near a window inside the house, witnessed the scene. Washington scuffled with the men long enough that the neighbor was able to run home, retrieve a handgun, and open fire on the vehicle from his front porch. The eyewitnesses verified that Scarber climbed into the driver's seat while a second vehicle[,] driven by defendant King, rolled up and opened fire on the

neighbor with an automatic rifle. Other witnesses confirmed that the tandem of vehicles sped off through the streets after the shots were fired. Soon afterward, defendant King forced Washington to make a series of calls demanding ransom in return for his life.

A former friend of Scarber's and associate of [Taylor and King], Troy Ervin, provided a detailed account of events after Washington was taken captive. The group took Washington to a house owned by Ervin's sister, and defendant King persuaded Ervin to trade cars with him for a while. When Ervin visited the house, he was initially denied access into the home. Scarber later called him and told him that he and the other defendants had kidnapped Washington and held him at the house. Scarber explained that Taylor had helped and that King had shot at the man's defenders. Scarber also admitted that he almost blew himself up burning the man's vehicle. This information was confirmed at trial by a witness who heard a large explosion that night and saw a vehicle, later identified as Washington's Expedition, on fire outside her home. Ervin visited the house again and found Washington lying on the floor of a back room wearing nothing but a sheet. Taylor guarded the man with an automatic rifle like the one described by witnesses to Washington's capture, and King was armed with a handgun like the one Scarber had used. While Ervin was there, he heard Taylor deny Washington's request to use the phone again to make more ransom calls.

Ervin left, but returned again later after Scarber called and told him that King had shot Washington in the legs and he had bled to death. Ervin was agitated at finding that Washington was killed in his sister's house, because it associated him with the murder. He saw the dead body in the back room, and then he went to the hardware store for King and purchased tools for burying the body. After he dropped off the tools, he was again called and informed that the group had buried the body in the back yard of the property. Ervin was again agitated at the use of his sister's property, but Taylor assured him that the burial site was inconspicuously concealed by the doghouse and the body was secure under a layer of concrete. Searchers later found

the body buried as Ervin described it. The body was found with two gunshot wounds, one through each leg.

Upon hearing that Ervin, who was not charged with a crime, had made a statement to police about Washington's murder, defendant Scarber also decided to make a statement. Except for Scarber's self-serving insistence that he participated in the crimes under duress and tried to care for Washington by bandaging his first gunshot wound and bringing him water, Scarber's statement to police was remarkably consistent with Ervin's. Scarber's statement confirmed the details of a successful ransom recovery that involved a peculiar delivery method, a particular mailbox, and a relatively small amount of money and drugs. Scarber's statement described defendant King as Washington's killer, and explained that, before he shot Washington a second time, King expressed a frustrated lack of concern with Washington's life and an unabashed willingness to kill him. Because the prosecutor wanted to place defendant Scarber's statement into evidence, Scarber received a separate jury for the purpose, isolating defendant King's and defendant Taylor's jury from Scarber's blame-shifting account of Washington's captivity. [*People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2007 (Docket Nos. 273443, 273543, and 273955), at 2-3.]

A jury convicted King and Taylor of second-degree murder,[1] MCL 750.317; first-degree felony murder, MCL 750.316(1)(b); kidnapping, MCL 750.349; and possession of a firearm during the commission of a felony, MCL 750.227b. It also convicted King of armed robbery, MCL 750.529, but acquitted Taylor of armed robbery. The trial court sentenced King to life imprisonment for the first-degree felony murder conviction, 25 to 80 years for the second-degree murder, armed robbery, and kidnapping convictions, and two years for the felony-firearm conviction. It sentenced Taylor to life

[1] Both were charged with first-degree premeditated murder, but the jury convicted them of the lesser offense of second-degree murder.

imprisonment for the first-degree murder conviction, 25 to 80 years for the kidnapping conviction, and two years for the felony-firearm conviction.[2]

A separate jury convicted defendant Scarber of first-degree premeditated murder, MCL 750.316(1)(a); felony murder; armed robbery; kidnapping; felony-firearm; and felon in possession of a firearm, MCL 750.224f. The trial court sentenced him to life imprisonment for the premeditated murder conviction, 38 to 80 years for the armed robbery and kidnapping convictions, and two years for the felony-firearm conviction.[3]

After consolidating defendants' appeals, the Court of Appeals affirmed Scarber's convictions and sentences, but set aside King's second-degree murder and kidnapping convictions and Taylor's kidnapping conviction on double jeopardy grounds.[4] All three defendants sought leave to appeal in this Court.

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[2] The trial court vacated Taylor's second-degree murder conviction on double jeopardy grounds.

[3] The trial court vacated Scarber's felony-murder conviction on double jeopardy grounds and dismissed his felon in possession conviction without explanation.

[4] The Court reasoned that King could not be convicted of both first-degree and second-degree murder of the same person. With respect to King's kidnapping conviction, the Court ruled that either the kidnapping conviction or the armed robbery conviction was the predicate felony for the felony-murder conviction, so setting aside the kidnapping conviction meant that King would only receive one punishment for the kidnapping conviction (his sentence for felony murder), and then could be separately punished for armed robbery. The Court set aside Taylor's kidnapping conviction using the same reasoning (the only difference is that Taylor was acquitted of armed robbery). *Taylor*, *supra* at 3-5. We note that because the Court of Appeals issued its opinion in this case before we issued our opinion in *People v Ream*, 481 Mich 223, 225; 750 NW2d 536 (2008) (holding that "convicting and sentencing a defendant for both felony murder and the predicate felony does not necessarily violate the 'multiple punishments' strand of the Double Jeopardy Clause"), the Court did not have the benefit of our holding in *Ream* when it decided this case.

II. ANALYSIS

Defendant King challenges the trial court's admission, through Ervin's testimony,[5] of defendant Scarber's statements to Ervin that (1) Scarber, King, and Taylor had kidnapped Washington and were holding him at the house owned by Ervin's sister and that (2) King had shot Washington once in each leg, causing him to bleed to death. King argues before this Court, as he did before the Court of Appeals, that Scarber's statements to Ervin were inadmissible hearsay and that the trial court erred in failing to consider their reliability before holding that the statements would not violate the Confrontation Clause. The Court of Appeals held that the rules of evidence did not preclude admission of the statements because they fell within the hearsay exception for statements against the declarant's penal interest, MRE 804(b)(3). *Taylor*, *supra* at 5. It also held that the trial court's failure to analyze the reliability of the statements was harmless because the statements bore sufficient indicia of reliability under the factors articulated in *Poole*, *supra* at 165, and they therefore did not violate King's right of confrontation. *Taylor*, *supra* at 5-6.

We hold that the portion of *Poole* pertaining to the requirements of the Confrontation Clause is no longer good law because it was premised on *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), which has been overruled by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Because the hearsay statements in this case were nontestimonial, they do not implicate the Confrontation Clause, *Davis*, *supra* at 821, and their admissibility is governed solely by MRE 804(b)(3). We never-

[5] As a codefendant, Scarber was not available to testify at trial.

theless affirm the decision of the Court of Appeals on the basis of the Court's determination that the statements were admissible under MRE 804(b)(3).

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. This Court's Confrontation Clause analysis in *Poole* was predicated on the Confrontation Clause analysis articulated by the United States Supreme Court in *Roberts*. In *Roberts*, the Court considered the relationship between the Confrontation Clause and the hearsay rule. It held that the Confrontation Clause limits the scope of admissible hearsay in two ways: first, it generally requires the prosecution to either produce the declarant or demonstrate that he is unavailable; second, it requires that the statement bear certain "indicia of reliability." *Id*. at 65-66. The Court further held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id*. at 66. Otherwise, the evidence is inadmissible "absent a showing of particularized guarantees of trustworthiness." *Id*.

In *Poole*, this Court considered the admissibility of a declarant's voluntary, out-of-court statement made to someone other than a police officer, implicating the declarant and the defendant in criminal activity. *Id*. at 153-154. It held that in order for such a statement to be admissible as substantive evidence against the defendants at trial, it must be admissible under both MRE 804(b)(3) and the Confrontation Clause. *Id*. at 157. After concluding that the statement was admissible under MRE 804(b)(3), the Court considered whether admission of the statement at issue violated the defendants' right of confrontation. *Id*. at 162. Following a discussion of *Roberts* and *Idaho v Wright*, 497 US 805,

819, 822-823; 110 S Ct 3139; 111 L Ed 2d 638 (1990) (applying *Roberts*), this Court set forth guidelines for analyzing the reliability of a declarant's out-of-court statement:

> In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Poole*, *supra* at 165.]

Applying these factors, the *Poole* Court concluded that the witness did not prompt the declarant to make the statement or inquire about events referenced in the statement. The statement did not minimize the declarant's role in the attempted robbery or his responsibility for the murder, and was not made in order to shift blame to the defendants, avenge the declarant, or curry favor. Nor was there any indication that the declarant had a motive to lie. On that basis, the Court concluded that the statement and the circumstances

under which it was made bore sufficient indicia of reliability to satisfy the requirements of the Confrontation Clause. *Id*. at 165-166.

The United States Supreme Court subsequently decided *Crawford* and *Davis*, which in combination overruled *Roberts* in its entirety. In *Crawford*, the Court overruled the *Roberts* "indicia of reliability" analysis where testimonial statements are concerned. It held that, "[w]here testimonial evidence is at issue," "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, *supra* at 68. The Court declined to "spell out a comprehensive definition of 'testimonial,' " but stated that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id*.

In *Davis*, the United States Supreme Court revisited the question of the application and requirements of the Confrontation Clause. It held that the clause only restricts the admissibility of testimonial statements because "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Id*. at 821. While nontestimonial statements are subject to traditional rules limiting the admissibility of hearsay, they do not implicate the Confrontation Clause. *Id*. The Court considered the circumstances under which statements made during a police investigation were testimonial. It concluded that such "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id*. at 822. "They are testimonial when the circumstances objectively indicate that there

is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*.

The overruling of *Roberts* by the United States Supreme Court in *Crawford* and *Davis* undermines the analytical underpinnings of this Court's decision in *Poole*, which was entirely predicated on *Roberts*. Thus, the holding in *Poole* that a codefendant's nontestimonial statement is governed by *both* MRE 804(b)(3) and the Confrontation Clause is no longer good law. Scarber's statements to Ervin were nontestimonial because they were made informally to an acquaintance, not during a police interrogation or other formal proceeding, see *Crawford*, *supra* at 68, or under circumstances indicating that their "primary purpose" was to "establish or prove past events potentially relevant to later criminal prosecution," *Davis*, *supra* at 822. Accordingly, the admissibility of the statements in this case is governed solely by MRE 804(b)(3). This Court's MRE 804(b)(3) analysis in *Poole* remains valid, however, and provides the applicable standard for determining the admissibility of a codefendant's statement under the hearsay exception for statements against a declarant's penal interest. MRE 804(b)(3) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) *Statement against interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would

> not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In *Poole*, this Court held:

> [W]here, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement —including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [*Poole*, *supra* at 161.][6]

In this case, Scarber made his first statement, implicating himself, King, and Taylor in the kidnapping, during a telephone conversation with Ervin on the day of the kidnapping. During another call to Ervin the following day, apparently shortly after Washington died,

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[6] *Poole*, *supra* at 161-162, explicitly relied on the commentary to FRE 804(b)(3), on which MRE 804(b)(3) is modeled. In *Williamson v United States*, 512 US 594, 600-601; 114 S Ct 2431; 129 L Ed 2d 476 (1994), the United States Supreme Court held that the federal rule "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." We note this development in federal law, but believe that the portion of *Poole* pertaining to MRE 804(b)(3) was correctly decided. See *People v VanderVliet*, 444 Mich 52, 60 n 7; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994) (noting that this Court finds commentary and caselaw on the federal rules of evidence helpful and, in some cases, persuasive). See also *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000). In *Poole*, we also suggested that "carry over" portions of a declarant's statement—those that inculpate the defendant but are not directly against the declarant's interest—might be admissible under a "catch-all" hearsay exception, which Michigan did not have at the time. *Poole*, *supra* at 159 n 11. Although the Michigan Rules of Evidence now contain such an exception, MRE 803(4), we do not address whether the statements at issue here are admissible under that exception because we conclude that they are admissible under MRE 804(b)(3).

Scarber made the second statement implicating King alone in the shooting of Washington. Scarber did not make any self-inculpatory statements during this call. The Court of Appeals concluded that both statements fell within the hearsay exception for statements against penal interest, stating that "because the statements at issue were provided in a narrative, both those portions that inculpated Scarber alone and those that inculpated his codefendants were admissible." *Taylor*, *supra* at 5. Moreover, in discussing the admissibility of the second statement under the Confrontation Clause, the Court acknowledged that "it is arguable that defendant Scarber's desire to disassociate himself from the murder provided him with a motive to lie about the identity of the individual (perhaps Scarber himself) who actually shot Washington." *Id*. at 6. The Court concluded, however, that the second statement was part of "a pattern of impugning communications" volunteered spontaneously and without reservation to a friend, not delivered to police, and "without any apparent secondary motivation other than the desire to maintain the benefits of the relationship's confidence and trust—and according to the record, to brag." *Id*. Accordingly, the Court concluded that "Scarber's statements to Ervin constituted a 'narrative of events,' so the statements were admissible at trial in their entirety." *Id*. Given these determinations, we are satisfied that the Court of Appeals sufficiently considered the issue of the statements' admissibility under MRE 804(b)(3) and *Poole*, *supra* at 161, and affirm on that basis.

In all other respects, defendants' applications for leave to appeal are denied, because we are not persuaded that the questions presented should be reviewed by this Court.

TAYLOR, C.J., and WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur that *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), is no longer controlling law to the extent it relied on *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), to hold that the admissibility of a codefendant's nontestimonial hearsay statement is governed by the Confrontation Clause of the Sixth Amendment of the United States Constitution. I dissent, however, because I would grant leave to appeal to consider the viability of *Poole*'s interpretation of MRE 804(b)(3) in light of *Williamson v United States*, 512 US 594, 600-601; 114 S Ct 2431; 129 L Ed 2d 476 (1994).

Under MRE 804(b)(3), a nontestimonial hearsay statement is not excluded if the declarant is not available as a witness and the statement "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Poole* interpreted MRE 804(b)(3) to allow a declarant's statements to be admitted as a whole against a codefendant, even where some of the statements inculpate the codefendant without inculpating the declarant, if made "in the context of a narrative of events" that as a whole was against the declarant's penal interest. *Poole, supra* at 161. The *Poole* Court stated that it was "guided by the comment of the Advisory Committee for the Federal Rules of Evidence concerning FRE 804(b)(3), on which the Michigan rule is modeled." *Id*.

As the majority opinion acknowledged in this case, one year after *Poole* was decided, the United States Supreme Court repudiated the interpretation of the federal commentary advanced in *Poole*. See *Williamson, supra* at 600-601. Specifically, *Williamson* held that "the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory state-

ments, even if they are made within a broader narrative that is generally self-inculpatory. . . . [T]his is especially true when the statement implicates someone else." *Williamson, supra* at 600-601. *Williamson* further stated that the Court did not need to look to the federal commentary to interpret FRE 804(b)(3) because "the policy expressed in [the rule]'s text points clearly enough in one direction that it outweighs whatever force the Notes may have." *Id.* at 602. Nevertheless, the Court considered the portion of the federal commentary on which *Poole* relied, and found it "not particularly clear" and inconsistent with other portions of the commentary, which the Court found to support a contrary interpretation. *Id.*

This Court should grant leave to appeal to reconsider the validity of *Poole* in light of *Williamson*. The majority opinion dismisses *Williamson* in a footnote by tersely stating that "[w]e note this development in federal law, but believe that the portion of *Poole* pertaining to MRE 804(b)(3) was correctly decided." *Ante* at 379 n 6. While the United States Supreme Court's interpretation of FRE 804(b)(3) does not necessarily control how this Court interprets MRE 804(b)(3), I cannot agree that *Poole* is so clearly and completely unaffected by *Williamson* that it is appropriate for this Court to dismiss the issue in a footnote.

The United States Supreme Court's express rejection of the interpretation of the federal commentary on which *Poole* relies is significant. The majority misses the point when it notes that this Court is not bound by the FRE by stating that "this Court finds commentary and caselaw on the [FRE] helpful and, in some cases, persuasive." *Ante* at 379 n 6, citing *People v VanderVliet*, 444 Mich 52, 60 n 7; 508 NW2d 114 (1993). When this Court bases its interpretation of an MRE on the federal

commentary to the equivalent FRE, and the United States Supreme Court then soundly rejects that understanding of the FRE, it merits greater attention from this Court than dismissal in a footnote. It is true that we are not bound by the FRE because we find commentary and caselaw for the FRE "only" helpful and sometimes persuasive. But, because we do find commentary and caselaw for the FRE helpful and sometimes persuasive, it is worth evaluating in a meaningful, substantive manner whether *Poole*'s interpretation of MRE 804(b)(3) was correct irrespective of *Williamson*'s rejection of *Poole*'s reasoning.[1] This jurisprudentially significant issue merits, at a minimum, granting leave to appeal.

Further, as stated in my dissent in *Poole*, I continue to think that it is more consistent with the text of MRE 804(b)(3) to exclude the portions of a declarant's statements that implicate a codefendant but are not against the declarant's penal interest. See *Poole, supra* at 166-169 (CAVANAGH, J., dissenting). The exception to the general rule against hearsay in MRE 804(b)(3) allows admission of statements against interest only insofar as a "reasonable person in the declarant's position would not have made the statement unless believing it to be true." As stated in *Williamson, supra* at 599-600:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. . . . The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to

[1] In lieu of conducting a meaningful, substantive evaluation of the validity of *Poole* after *Williamson*, the majority opinion "notes" *Williamson* and affirms *Poole* without analysis and seemingly without genuine consideration.

> mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

Poole's interpretation of MRE 804(b)(3) is an imprecise proxy for when a "reasonable person in the declarant's position would not have made the statement unless believing it to be true." MRE 804(b)(3). *Poole* incorrectly assumed that any statement made in the context of a narrative of events that as a whole is against the declarant's penal interest is one that a reasonable person in the declarant's position would not have made unless it were true. *Williamson*'s interpretation more accurately reflects the rule's text and the reality that the underlying justification for inferring that self-inculpatory statements are true does not necessarily extend to contemporaneous non-self-inculpatory statements. This is especially true when, as in this case, the non-self-inculpatory statements exculpate the declarant and inculpate a codefendant.[2]

This Court should grant leave to appeal to reconsider *Poole* in light of *Williamson* because *Williamson* rejected the interpretation of the federal commentary on which *Poole* was based. Further, the facts of this case illustrate the flaws in *Poole*'s interpretation of MRE 804(b)(3) as compared to *Williamson*'s interpretation.

KELLY, J., concurred with CAVANAGH, J.

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[2] To the extent that Scarber's statements in the first phone call implicated both himself and his codefendants, a court could infer that a reasonable person would not have made the statements unless they were true. In contrast, Scarber's statements in the second telephone call implicated only King. It would be in Scarber's interest to exculpate himself from the shooting by inculpating only King in the second call; therefore, a "reasonable person" might have made those statements even if they were not true. This demonstrates why *Williamson*'s application of MRE 804(b)(3) reaches a result more precisely connected to the rule's text than *Poole*'s interpretation does.

PEOPLE v MAXSON

Docket No. 129693. Decided December 22, 2008.

Mark A. Maxson pleaded guilty in the Ingham Circuit Court, James R. Giddings, J., to two counts of second-degree criminal sexual conduct. The defendant did not request appointed counsel or seek to file a direct appeal before his conviction became final in September 2002. The defendant filed a motion for relief from judgment in June 2004, the denial of which was on appeal with the Court of Appeals when the United States Supreme Court decided *Halbert v Michigan*, 545 US 605 (2005), which held that indigent defendants who plead guilty of criminal offenses are entitled to appointed counsel on direct appeal. The Court of Appeals, TALBOT, P.J., and FITZGERALD and METER, JJ., denied the defendant's delayed application for leave to appeal. Unpublished order of the Court of Appeals, entered August 16, 2005 (Docket No. 260335). The same panel also denied the defendant's motion for reconsideration. Unpublished order of the Court of Appeals, entered September 22, 2005 (Docket No. 260335). The defendant sought leave to appeal in the Supreme Court.

In lieu of granting leave, the Supreme Court, in an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, and YOUNG, *held*:

Based on the federal and state law regarding retroactive application of criminal procedures, *Halbert* does not apply retroactively to cases in which a defendant's conviction became final before *Halbert* was decided.

1. Under the federal standard, new constitutional rules of criminal procedure are generally not retroactively applicable to those cases that have become final before the new rules are announced. The two exceptions to this general rule are for new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe, and for new rules that require the observance of those procedures that are implicit in the concept of ordered liberty. The first exception is clearly inapplicable. Additionally, providing counsel to an indigent defendant for an appeal of a guilty plea cannot be said to be implicit in the concept of ordered liberty, because such

provision of counsel does not arise from the Sixth Amendment right to counsel, and a state is not required to provide any appellate proceedings at all for defendants who plead guilty. Therefore, the second exception is also inapplicable.

2. Michigan law generally does not apply new rules of criminal procedure retroactively to cases in which a defendant's conviction has become final. To determine whether a new rule should be applied retroactively, the Court must consider the purpose of the new rules, the general reliance on the old rule, and the effect of retroactive application of the new rule on the administration of justice. Consideration of these factors does not weigh in favor of applying *Halbert* retroactively.

Affirmed.

Justice CAVANAGH, joined by Justice KELLY, dissenting, rejected the majority's application of the federal standard for determining retroactivity because that standard was tailored for use in the unique context of federal habeas corpus issues. He would instead hold that *Halbert* applies retroactively under the three-pronged state standard set forth in *People v Sexton*, 458 Mich 43 (1998), because the appointment of counsel on a first-tier appeal from a plea-based conviction involves the correction of errors and therefore involves the ascertainment of guilt or innocence; the rule in *Halbert* was neither unexpected nor indefensible; and the administration of justice requires the fair application of fundamental rights, including the right to counsel on first-tier appellate review. As *Halbert* held, the state's interest in the finality of the criminal justice process cannot justify denying appellate counsel to defendants who pleaded guilty.

CRIMINAL LAW — CRIMINAL PROCEDURE — APPELLATE COUNSEL — RIGHT TO APPELLATE COUNSEL — RETROACTIVITY OF DECISIONS.

The United States Supreme Court decision in *Halbert v Michigan*, 545 US 605 (2005), holding that indigent defendants who plead guilty of criminal offenses are entitled to appointed counsel on direct appeal, does not apply retroactively to cases in which a defendant's conviction became final before *Halbert* was decided.

Mark Allen Maxson, *in propria persona*.

MARKMAN, J. At issue here is whether the United States Supreme Court's decision in *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), should be applied retroactively to cases in which a

defendant's conviction has become final. In lieu of granting leave to appeal, we affirm the judgment of the trial court denying defendant's motion for relief from judgment, and we conclude under federal and state law that *Halbert* should not be applied retroactively to cases in which a defendant's conviction has become final.

I. FACTS AND PROCEDURAL HISTORY

In 2001, defendant pleaded guilty to two counts of second-degree criminal sexual conduct, and subsequently failed to request appointed counsel or to file a direct appeal. On June 23, 2005, the United States Supreme Court issued *Halbert*, which held that indigent defendants who plead guilty to criminal offenses are entitled to appointed appellate counsel on direct appeal. *Id*. at 610. After *Halbert* was decided, defendant requested appointed counsel in the instant motion for relief from judgment. However, because defendant's conviction was final before *Halbert* was decided, defendant is only entitled to counsel if the rule announced in *Halbert* is applied retroactively.

II. STANDARD OF REVIEW

The retroactivity of a court's ruling presents an issue of law that this Court reviews de novo. *People v Sexton*, 458 Mich 43, 52; 580 NW2d 404 (1998).

III. ANALYSIS

A. RETROACTIVITY UNDER FEDERAL LAW

"New legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co v Hyde*, 514 US 749, 758; 115 S Ct 1745; 131 L Ed 2d 820 (1995). This is because "at some point,

'the rights of the parties should be considered frozen' and a 'conviction . . . final.' " *Id.*, quoting *United States v Estate of Donnelly*, 397 US 286, 296; 90 S Ct 1033; 25 L Ed 2d 312 (1970) (Harlan, J., concurring). There are, however, "certain special concerns—related to collateral review of state criminal convictions—that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances." *Id.*

In *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), the United States Supreme Court set forth the federal standard for determining whether a rule regarding criminal procedure should be applied retroactively to cases in which a defendant's conviction has become final. *Teague* established the "general rule" that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310. However, *Teague* laid down two exceptions to this general rule: first, a new rule should be applied retroactively if it places " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' " *id.* at 307 (citation omitted); and second, a new rule should be applied retroactively "if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (citations and internal quotation marks omitted).

Thus, the first question under *Teague* is whether the rule in *Halbert* constitutes a new rule. " '[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.' " *Penry v Lynaugh*, 492 US 302, 314; 109 S Ct 2934; 106 L Ed 2d 256 (1989) (citation omitted). Deciding whether a rule is "new" requires a court to determine "whether 'a state court considering [the defendant's] claim at the time his conviction became

final would have felt *compelled* by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' " *O'Dell v Netherland*, 521 US 151, 156; 117 S Ct 1969; 138 L Ed 2d 351 (1997) (emphasis added and citations omitted). If a reasonable jurist would not have felt compelled by existing precedent, then the rule is new. *Beard v Banks*, 542 US 406, 413; 124 S Ct 2504; 159 L Ed 2d 494 (2004). In other words, the relevant question is not simply whether existing precedent might have *supported* the rule, but whether the rule "was *dictated* by then-existing precedent." *Id*. at 413 (emphasis in original).

We conclude that the rule in *Halbert* constitutes a new rule. Although *Halbert* found support in the earlier United States Supreme Court decision of *Douglas v California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963), that case did not clearly require the outcome in *Halbert*. *Douglas* held that when a state grants a first appeal as of right, the state is required to appoint appellate counsel for indigent defendants. *Id*. at 357. Because Michigan does not grant an appeal as of right to a defendant who pleads guilty,[1] and because the United States Supreme Court had previously decided that appointment of appellate counsel is unnecessary when an appellate court, such as a state's highest court, has the discretion to choose whether to reach the merits of a defendant's appeal, *Ross v Moffitt*, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974), a reasonable jurist could well conclude that *Douglas* did not compel the result in *Halbert*.

Because "it is more difficult . . . to determine whether [the Supreme Court] announce[d] a new rule

[1] Defendants who seek to appeal their guilty pleas must file an application for leave to appeal with the Court of Appeals. MCR 7.203(A)(1)(b).

when a decision extends the reasoning of [its] prior cases," *Saffle v Parks*, 494 US 484, 488; 110 S Ct 1257; 108 L Ed 2d 415 (1990), the "new rule" principle is designed to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v McKellar*, 494 US 407, 414; 110 S Ct 1212; 108 L Ed 2d 347 (1990). In *Halbert,* the dissenting Supreme Court justices argued against extending *Douglas*, further supporting the conclusion that *Douglas* did not compel the result in *Halbert* and that this Court's previous interpretation was reasonable.

Because the rule in *Halbert* was new, the remaining question under *Teague* is whether either of the two *Teague* exceptions applies. The first exception is clearly inapplicable, as the rule in *Halbert* does not concern a rule that " 'forbid[s] criminal punishment of certain primary conduct . . . [or] prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.' " *O'Dell*, *supra* at 157 (citation omitted). Thus, the only issue is whether *Halbert* constituted a "watershed" decision that involved "procedures . . . implicit in the concept of ordered liberty." *Graham v Collins*, 506 US 461, 478; 113 S Ct 892; 122 L Ed 2d 260 (1993) (citations and quotation marks omitted).

The United States Supreme Court has repeatedly emphasized the limited scope of the second *Teague* exception. The Court has observed that because any such rule "would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge, it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Beard, supra* at 417 (citations and quota-

tion marks omitted). The Supreme Court has referred to the right to counsel set forth in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), as an example of a rule that would fall into the second *Teague* exception. It is significant that in referring to this example, the Supreme Court observed, "In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon* (right to counsel), and *only to this rule*." *Beard*, *supra* at 417 (emphasis added and citation omitted).

Notably, the Sixth Amendment right to counsel articulated in *Gideon* and its progeny has a constitutional basis distinct from that underlying the *Douglas* line of cases addressing the right to counsel *on appeal* that are rooted in the Equal Protection and Due Process clauses of the Fourteenth Amendment. Further, considering that *Halbert* is unlikely to apply to any situation other than Michigan's unique legislative system of appeals from plea-based convictions, we agree with the Sixth Circuit that "[i]t does not represent a shift in 'bedrock procedural elements' and it cannot be said to be 'on par' with *Gideon*." *Simmons v Kapture*, 474 F3d 869, 887 (CA 6, 2007) (Reeves, J., dissenting), adopted by *Simmons v Kapture*, 516 F3d 450, 451 (CA 6, 2008) (holding that *Halbert* is not retroactive under *Teague*).

Additionally, a state is not required to provide any appellate proceedings *at all* for defendants who plead guilty. *Halbert*, *supra* at 610. In *Goeke v Branch*, 514 US 115; 115 S Ct 1275; 131 L Ed 2d 152 (1995), the Supreme Court held that "[b]ecause due process does not require a State to provide appellate process at all, a former fugitive's right to appeal cannot be said to be so central to an accurate determination of innocence or guilt as to fall within this exception . . . ." *Id.* at 120

(citations and quotation marks omitted).[2] Considering these holdings, the provision of appointed counsel for such a proceeding can hardly be said to be "implicit in the concept of ordered liberty." Accordingly, in our judgment, *Halbert* cannot be construed as a "watershed" decision, neither of the *Teague* exceptions applies, and *Halbert* thus is not retroactive under federal retroactivity jurisprudence.

B. RETROACTIVITY UNDER STATE LAW

The conclusion that *Halbert* is not retroactive under federal law does not end our analysis, however. A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords. *Danforth v Minnesota*, ___ US ___; 128 S Ct 1029, 1045; 169 L Ed 2d 859 (2008).[3] Accordingly, we turn to the question of whether *Halbert* should be deemed retroactive under state law. Michigan law has regularly declined to apply new rules of criminal procedure to

[2] "[A] State may not 'bolt the door to equal justice' to indigent defendants" once it has provided an avenue of appeal. *Halbert*, *supra* at 610, quoting *Griffin v Illinois*, 351 US 12, 24; 76 S Ct 585; 100 L Ed 891 (1956). This holding only emphasizes our position that *Halbert* is not a "watershed" decision like *Gideon* because *Halbert* is rooted in the Equal Protection and Due Process clauses of the Fourteenth Amendment, rather than in the Sixth Amendment right to counsel.

[3] To conclude that *Teague* was intended to apply strictly to federal habeas review, and not to state court proceedings, *Danforth* argued that: (1) *Teague* was silent regarding a state's ability to give broader effect to federal constitutional decisions, *Danforth*, *supra* at 1039; (2) *Teague* was based on the federal habeas statute, 28 USC 2241 *et seq.*, a "statutory authority that extends only to federal courts," *Danforth*, *supra* at 1040; and (3) *Teague* relied on considerations of comity and federalism, which "are [concerns] unique to *federal* habeas review of state convictions." *Id.* at 1041 (emphasis in original). Accordingly, the analysis in *Teague* binds only federal courts on habeas review, and a state court may use a different test to give broader effect to a new rule of criminal procedure established by the United States Supreme Court.

cases in which a defendant's conviction has become final. See *Sexton*, *supra* (requirement that the police inform a suspect when retained counsel is available for consultation); *People v Stevenson*, 416 Mich 383; 331 NW2d 143 (1982) (abrogation of common-law "year and a day" rule); *People v Young*, 410 Mich 363; 301 NW2d 803 (1981) (preconviction filing of habitual offender notice); *People v Smith*, 405 Mich 418, 433; 275 NW2d 466 (1979) (repeal of criminal sexual psychopath statute barring criminal action against those adjudicated criminal sexual psychopaths); *People v Markham*, 397 Mich 530; 245 NW2d 41 (1976) (double jeopardy "same transaction" test); *People v Rich*, 397 Mich 399; 245 NW2d 24 (1976) (erroneous "capacity standard" jury instruction); *People v Butler*, 387 Mich 1; 195 NW2d 268 (1972) (waiver of a defendant's constitutional rights in taking a guilty plea); *Jensen v Menominee Circuit Judge*, 382 Mich 535; 170 NW2d 836 (1969) (constitutional right to appeal in criminal cases); *People v Woods*, 382 Mich 128; 169 NW2d 473 (1969) (custodial interrogation procedures); *People v Fordyce*, 378 Mich 208; 144 NW2d 340 (1966) (custodial interrogation procedures).

In *Sexton*, we considered the following three factors to determine whether a new rule of criminal procedure should be applied retroactively:

> (1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice. [*Sexton*, *supra* at 60-61, citing *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971).]

Under the "purpose" prong, a law may be applied retroactively when it " 'concerns the ascertainment of guilt or innocence;' " however, " 'a new rule of procedure . . . which does not affect the integrity of the fact-finding process should be given prospective effect.' " *Id*. at 63, quoting *Young*, *supra at* 367. By pleading guilty, defendants are not contesting their guilt, but admitting it freely. Thus, the appointment of

counsel on appeal does not concern the ascertainment of guilt or innocence. See *Goeke*, *supra* at 120. Rather, an appeal from a guilty plea concerns only the procedures of the plea process; the defendant has already admitted substantive guilt while represented by counsel. It is hard to imagine a more dispositive process by which guilt can be accurately determined, and in which the appellate process becomes less central to an accurate determination of guilt, than that in which a full admission to criminal conduct has come from the mouth of the defendant himself under oath,[4] and in an environment in which the defendant has been accorded every protection against a coerced or mistaken confession. Consequently, the first *Sexton* prong counsels against retroactivity.

The second *Sexton* prong, which concerns the "general reliance on the old rule," does not, in our judgment, strongly counsel either way in this case. When considering "reliance," a court examines whether individual persons or entities have been "adversely positioned . . . in reliance" on the old rule. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 221; 731 NW2d 41 (2007). The dissent implies that defendants who pleaded guilty between 1994 and 2005, as a class, were "penalized by the general reliance" on the old rule.[5] *Post* at 411. We disagree. To be considered to have detrimentally relied on the old rule, a defendant must have relied on the rule in not pursuing an appeal and have suffered harm as a result of that reliance. We recognize that ascertaining the precise number of defendants who meet this standard is impossible, but clearly *all* defendants who

[4] Since March 1, 1995, this Court has required all defendants who plead guilty to be placed under oath before doing so. MCR 6.302(A).

[5] 1994 PA 374, which implemented Proposal B, became effective December 27, 1994.

pleaded guilty between 1994 and 2005 do not meet this standard. Indeed, appeals of guilty pleas before the old rule indicate that it is likely that very few do.

First, only a very small percentage of defendants who pleaded guilty *before the old rule* became effective actually appealed their pleas. Before the old rule was implemented in 1994, an estimated 89% to 94% of defendants who pleaded guilty did not appeal their pleas.[6] During this period, indigent defendants were appointed appellate counsel if they chose to pursue an appeal. Yet, fewer than one in ten of all defendants who pleaded guilty actually decided to appeal their pleas. The large number of defendants who pleaded guilty but did not seek appeal can be explained by a variety of factors, most important of which are the lack of an appealable issue after the plea and the risk inherent in appealing a guilty plea.[7] Therefore, it can be assumed that most defendants who pleaded guilty between 1994 and 2005 and did not appeal, rather than not appealing

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[6] The State Appellate Defender Office estimated, on the basis of the cases it handled, that less than six percent of guilty pleas were appealed. House Legislative Analysis Section, Second Analysis, 1994 PA 374, 375 (January 5, 1995), p 2. The House Legislative Analysis Section's November 2, 1993, analysis stated that "[e]stimates put the proportion of people who appeal after pleading guilty at 11 percent or substantially less." House Legislative Analysis Section, First Analysis, House Bill 4070, 4071 (November 2, 1993) ("HB 4070-4071 Analysis"), p 3.

[7] Under MCR 6.312, if an appellate court vacates a defendant's guilty plea, "the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered," including charges more severe than the charge or charges to which the defendant pleaded guilty or charges that the prosecutor agreed to drop in exchange for the plea agreement. The risk of proceeding to trial on more serious or additional charges often persuades defendants not to pursue a plea appeal. Robertson, *Felony Plea Appeals in Michigan — 1992*; (Lansing: Michigan Appellate Assigned Counsel System, 1992), p 2. See also *People v Sutton*, 158 Mich App 755; 405 NW2d 209 (1987).

because of reliance on the old rule, did not appeal because of factors unrelated to, and existing before, the old rule.

Second, a defendant who relied on the old rule in not filing an appeal must also have *suffered actual harm* from that reliance in order to have "detrimentally relied" on the old rule. That is, the old rule would have had to preclude defendant from filing an appeal that would have resulted in some form of *relief*. Out of that small number of defendants who pleaded guilty before the old rule and subsequently appealed the plea, only a very limited number received relief on appeal. In 1994, before the old rule was adopted, the Court of Appeals estimated that only three to four percent of guilty plea cases that came before it resulted in some form of relief.[8] The State Appellate Defender Office (SADO), however, estimates that approximately 27% of pleading *indigent* defendants whom it represented received some measure of relief.[9]

Accordingly, the number of pleading defendants who could be said to have detrimentally relied on the old rule would range somewhere between 0.18% (6% x 3%) and 2.97% (11% x 27%), combining the lowest and highest Court of Appeals/House Legislative Analysis and SADO figures. Thus, there is no reason why it should not be

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[8] House Legislative Analysis Section, First Analysis, Ballot Proposal B, 1994 General Election, (October 14, 1994), p 4.

[9] HB 4070-4071 Analysis, *supra* at 2; Senate Fiscal Agency, First Analysis, S.J.R. D (Feb 18, 1993), p 2. According to SADO, 42% of the guilty pleas it appealed were entirely dismissed without being heard. Cases "not heard" were typically handled by a "short, simple affirmation of the trial court's decision." *Id*. For the remaining 58% that were not dismissed without a hearing, 47% of *those* appeals received relief. Thus, using the SADO figures, of every six SADO-represented, guilty-pleading defendants who appealed, approximately 1.6, or 27%, secured some measure of relief ((42% x 0%) + (58% x 47%)).

assumed that, at a minimum, 97% to 99% of the defendants who pleaded guilty under the old rule would *not* have received relief under the new rule.[10] While it cannot be disputed that *some* number of defendants would receive relief if *Halbert* were made retroactive,[11] this would be true of extending *any* new rule retroactively, yet this is not generally done. Instead, we must consider, as best as possible, the extent of the detrimental reliance on the old rule, and then balance this against the other *Sexton* factors, as well as against the fact that each defendant who pleaded guilty has received all the rights under the law to which he or she was entitled at the time. Here, we conclude that the extent of the detrimental reliance is remarkably minimal and, as explained above and below, does not outweigh the other *Sexton* factors that clearly counsel against retroactive application.

Finally, affording appointed counsel to defendants whose appeals became final before *Halbert* would have a markedly adverse effect on the administration of justice, the third *Sexton* prong. The state's strong interest in finality of the criminal justice process would be undermined as presumably significant numbers of the incarcerated population would be entitled to avail themselves of appointed counsel and new appeals, de-

[10] Moreover, if anything, these figures overstate the number of defendants who adversely relied on the old rule. A defendant, for example, who has received relief in the form of resentencing, or the vacating of a plea, has not necessarily been adversely affected if he or she ultimately receives the same sentence after resentencing or is reconvicted after trial.

[11] Appellate "relief," of course, far more often than not consists of such things as requiring judicial rearticulation of a sentence, affording additional rights of allocution, correcting a presentence report, adjusting restitution amounts, clarifying the application of guidelines, and vacating consecutive sentences, as opposed to reversing a conviction or reducing a sentence.

spite having knowingly and intelligently pleaded guilty to criminal conduct while represented by counsel.

"[F]inality of state convictions is a *state* interest . . . that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." *Danforth*, *supra* at 1041 (emphasis in original). The principle of finality "is essential to the operation of our criminal justice system." *Teague*, *supra* at 309. The state's interest in finality discourages the advent of new rules from "continually forc[ing] the State[] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards," *id*. at 310 (emphasis omitted), and also "serves the State's goal of rehabilitating those who commit crimes because '[rehabilitation] demands that the convicted defendant realize that he is justly subject to sanction, that he stands in need of rehabilitation.' " *Kuhlmann v Wilson*, 477 US 436, 453; 106 S Ct 2616; 91 L Ed 2d 364 (1986), quoting *Engle v Isaac*, 456 US 107, 128 n 32; 102 S Ct 1558; 71 L Ed 2d 783 (1982) (citation and quotation marks omitted). Accordingly, applying *Halbert* retroactively to cases in which a conviction has become final would have a markedly adverse effect on the administration of justice.

Thus, although retroactive application of *Halbert* would potentially provide a small number of defendants with some form of relief, this does not outweigh the certainty that by applying *Halbert* retroactively, many guilty-pleading defendants whose convictions have become final would inundate the appellate process with new appeals. In light of the limited judicial resources of the state, it is our judgment that those resources would be better preserved for defendants currently charged—

some of whom may be innocent or otherwise entitled to relief—than for defendants who have knowingly pleaded guilty and presumably accepted the consequences of their decisions. Thus, the third prong weighs far more heavily against retroactive application than the second prong weighs for retroactive application. Considered together, all of the *Sexton* factors, therefore, strongly counsel against applying *Halbert* retroactively under state law to cases in which a defendant's conviction has become final.

IV. FURTHER RESPONSE TO THE DISSENT

(1) The dissent asserts that we are "swerv[ing] and dodg[ing]" decisions of the United States Supreme Court by "refusing" to make *Halbert* retroactive in order to "deny indigent defendants access to justice." *Post* at 403. The premise of this overheated assertion is that the United States Supreme Court has already rejected our reasoning, but its repetition by the dissent does not make this so. We have set forth what we think the law is, and we have followed *Teague* and other relevant decisions to their logical and reasonable conclusions. Whatever the dissent's personal conceptions of what should be required by the Constitution, we have applied what this Court and the United States Supreme Court have said the Constitution requires.

(2) The dissent describes us as "arbitrarily" cutting off constitutional relief to defendants whose plea-based convictions became final between 1994 and 2005. We fail to see what is "arbitrary" about applying existing precedent to determine whether *Halbert* is retroactive and, having concluded that it is not, employing the date of the *Halbert* decision to determine who precisely is entitled to the benefits of that decision. Using the date of a decision that has granted a right as the starting

date for entitlement to that right has long been the standard procedure of this Court. See *Woods*, *supra* at 138-139.

(3) The dissent believes that because *Halbert* overruled this Court's determination in *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000), that MCL 770.3a was constitutional, his position in the instant case should prevail. This overlooks that the issues in *Bulger* and this case are simply different. Unlike *Bulger*, this case does not concern whether the right to first-tier appellate counsel exists; *Halbert* has decided this. Rather, the present issue concerns the extent to which *Halbert* is retroactive. Indeed, in *Bulger*, we expressly declined to address the constitutionality of MCL 770.3a because it did not apply to the defendant in that case. *Id.* at 506 ("Because this new statute does not apply to defendant, the question of its constitutionality is not before us.").[12] While the analysis employed by the Supreme Court in recognizing a constitutional right may well be relevant in some instances in assessing the right's retroactivity, it will rarely be conclusive. Indeed, *Teague* and *Danforth* themselves confirm that assessments of retroactivity are independent of the recognition of the right itself and that the two determinations involve different questions and require the evaluation of different interests.

(4) The dissent concludes that precedent "compelled" the result in *Halbert* by declaring the holding in *Ross* to be so clear that it "does not support a claim that a reasonable jurist could conclude that the rule of *Halbert* was not compelled." *Post* at 407. We think the simple fact that *Halbert* was a 6 to 3 decision, and reversed a majority of this Court, makes sufficiently clear that

[12] Only later, in *People v Harris*, 470 Mich 882 (2004), did we hold that, "[p]ursuant to the analysis provided by this Court in *Bulger*, MCL 770.3a is constitutional."

reasonable jurists could conclude that *Halbert* was not "compelled." Further, even the trial court that *granted* conditional habeas relief in *Bulger* recognized that this Court's position was "not contrary to any *clearly established* Supreme Court precedent," *Bulger v Curtis*, 328 F Supp 2d 692, 703 (ED Mich, 2004) (emphasis added).[13]

(5) The dissent complains that we "rel[y] on the presumption that all defendants who plead guilty are indeed guilty." *Post* at 409. When a defendant pleads guilty, he *admits guilt under oath*. We freely admit that there is some sense on our part that "defendants who plead guilty are indeed guilty." By taking an oath, defendants give courts permission to presume that admissions of guilt are true. This Court has made clear that after conviction, defendants are no longer cloaked with a presumption of innocence, *People v Mateo*, 453 Mich 203, 222; 551 NW2d 891 (1996) (WEAVER, J., concurring), thereby permitting this Court to presume that those who have pleaded guilty are, in fact, guilty.

More importantly, *Halbert* did not address the ascertainment of guilt, but rather discussed the complexity of appeals and why counsel is often required to navigate this process. *Halbert, supra* at 621 ("Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson . . . ."). Although the opinion refers to " 'myriad and often complicated' substantive issues" potentially involved in appeals, at no time does it equate these issues with the ascertainment of guilt. *Id.* (citation omitted).

Moreover, not only are several of the potential appellate issues that the dissent identifies clearly unrelated

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[13] In light of the Sixth Circuit's conclusion in *Simmons* that *Halbert* is not retroactive under *Teague,* and the dissent's assertion that "*Teague* does not control the measure of retroactivity applied by a state court," *post* at 408, we see no reason to further discuss the dissent's *Teague* analysis.

to questions of guilt (jurisdictional defects, double jeopardy claims, and claims that the state had no right to proceed such as having charged a defendant under an inapplicable statute), but it is nonsensical for the dissent to conclude that the Supreme Court determined that claims involving " 'constitutional defects that are *irrelevant to [a defendant's] factual guilt*' " apply to the guilt or innocence of a defendant. *Post* at 410 n 2, quoting *Bulger*, *supra* at 561 (CAVANAGH, J., dissenting) (emphasis added).

Although we recognize that such procedural matters may well be essential and, in some cases, constitutionally mandated, their existence does not automatically convert them into issues concerning guilt or innocence. The United States Constitution provides criminal defendants the right to due process of law. US Const, Am V. The question of whether a defendant has received due process is different in many contexts from whether a given procedure affects the "integrity of the fact-finding process." *Sexton*, *supra* at 63 (internal citation and quotation marks omitted). By conflating, as the dissent has done, whether a procedure is necessary for due process with whether a procedure ascertains a defendant's guilt or innocence, the dissent would compel that virtually *all* new rules of criminal procedure become retroactive. Perhaps the dissent could explain what new rules would *not* be retroactive under the analysis that he sets forth. And, while such automatic retroactivity may be the dissent's personal preference, *Sexton*'s and *Teague*'s very existence refute that proposition as the preference of the law.

V. CONCLUSION

For these reasons, we hold that *Halbert* does not apply retroactively to cases in which a defendant's

conviction has become final, either under federal or state retroactivity jurisprudence. Accordingly, we affirm the trial court's denial of defendant's motion for relief from judgment.

TAYLOR, C.J., and WEAVER, CORRIGAN, and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). Once again, the majority "swerves and dodges the decisions of the United States Supreme Court" to deny indigent defendants access to justice, this time by refusing to retroactively apply the rule of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). See *People v Bulger*, 462 Mich 495, 522; 614 NW2d 103 (2000) (CAVANAGH, J., dissenting). Ironically, the majority now applies the same reasoning that the United States Supreme Court rejected in *Halbert* to conclude that *Halbert* should not apply retroactively. I must respectfully dissent.

Before 1994, indigent defendants in Michigan who had pleaded guilty could appeal as of right and were commonly provided with appellate counsel. See, e.g., *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). In 1994, the Michigan Constitution was amended to provide that appeal from a guilty or nolo contendere plea was "by leave of the court." Const 1963, art 1, § 20. Some trial courts began to interpret this amendment as abolishing the right to counsel for indigent defendants who had pleaded guilty. *Halbert*, 545 US at 609. This interpretation was codified by the Legislature in MCL 770.3a, which stated that defendants who plead guilty "shall not have appellate counsel appointed for review," with certain exceptions.

A majority of this Court upheld the constitutionality of MCL 770.3a in *People v Harris*, 470 Mich 882 (2004)

(relying on the analysis of *Bulger*, *supra*). The majority came to this conclusion by reasoning that first-tier review of plea-based convictions is discretionary, that plea proceedings are simpler than proceedings at trial, and that a defendant who enters a guilty plea accedes to the state's interest in the finality of criminal proceedings. *Bulger*, 462 Mich at 508, 516-517; see also *Halbert*, 545 US at 613-614. I dissented, urging the United States Supreme Court to "correct the constitutional miscarriage committed by the majority" and to "issue the decision that is uniformly directed by its past opinions." *Bulger*, 462 Mich at 522-523 (CAVANAGH, J., dissenting).

The United States Supreme Court did indeed correct the error of *Bulger* and *Harris* in its 2005 *Halbert* decision. There the Court held that MCL 770.3a was unconstitutional and restored the constitutional right to the appointment of counsel for first-tier appellate review for indigent defendants in Michigan who had pleaded guilty. Now the question is whether indigent defendants whose plea-based convictions became final between 1994 and 2005 should have the constitutional relief *Halbert* demands by retroactive application of that decision. The majority arbitrarily cuts off constitutional relief to these indigent defendants, applying the same faulty reasoning it used to deny their constitutional rights in the first place.

The majority concludes that *Halbert* should not apply retroactively under *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989). I observe first that *Teague* is inapplicable to this case. The United States Supreme Court has stated that "[a] close reading of the *Teague* opinion makes clear that the rule it established was *tailored to the unique context of federal habeas* and therefore had *no bearing* on whether States could

provide broader relief in their own postconviction proceedings than required by that opinion." *Danforth v Minnesota*, ___ US ___; 128 S Ct 1029, 1039; 169 L Ed 2d 859 (2008) (emphasis added). The Court went on to say that "[i]t is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." *Id.* at ___, 128 S Ct at 1041. Thus, *Teague* does not restrain this Court from providing a remedy that it previously wrongfully denied.

Nonetheless, I believe that even *Teague* counsels retroactive application in this case. *Teague* held that, generally, courts should not retroactively apply rules of criminal procedure that are "new." The rule of *Halbert* is not new. First, and most obviously, the rule of *Halbert* is not new because it reinstated an old rule. See, e.g., *Ginther*, *supra*. *Halbert* merely restores the law that existed in Michigan before 1994. Thus, it is not new.

A rule may be new, under *Teague*, if "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 US at 301 (opinion of O'Connor, J.). As I stated in *Bulger*, I believe that the result of *Halbert* was *uniformly directed* by the past decisions of United States Supreme Court. *Bulger*, 462 Mich at 522-523 (CAVANAGH, J., dissenting). A rule that is uniformly directed is not new.

The majority opinion concludes that the rule of *Halbert* is not compelled, and thus new, because appeal from a guilty plea in Michigan is by leave and discretionary. It reasons that the application of *Douglas v California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963), was not dictated because *Douglas* involved a first appeal as of right, while the first appeal of plea-based convictions in Michigan is discretionary. The

majority opinion further reasons that *Ross v Moffitt*, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974), appears to apply because it held that appointment of counsel was not required when appeal is made to a court that has discretion "to choose whether to reach the merits of a defendant's appeal." *Ante* at 389. First, I observe that this very reasoning was rejected by the United States Supreme Court in *Halbert*. The Court stated that "Halbert's case is properly ranked with *Douglas* rather than *Ross*" and, thus, held "that the Due Process and Equal Protection Clauses *require* the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert*, 545 US at 610 (emphasis added).

Second, the fact that the defendant's appeal in *Douglas* was as of right was irrelevant to the outcome of that case. Rather, the critical issue was the fact that, "[w]hether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Halbert*, 545 US at 619. In *Ross*, the discretion involved was irrespective of the merits. As the *Ross* Court stated, its ruling applied to appellate courts that may deny leave even when they conclude that the decision on the merits in the court below was incorrect. *Ross*, 417 US at 615. That is not the case when a defendant seeks first-tier review in the Michigan Court of Appeals. See *Bulger*, 462 Mich at 541-542 (CAVANAGH, J., dissenting); *Halbert*, 545 US at 617 ("Michigan's intermediate appellate court looks to the merits of the claims made in the application"). Further, *Ross* made clear that its decision applied when a defendant had already "received the benefit of counsel in examining

the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals" and when "a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals . . . ." *Ross*, 417 US at 614-615. That is not the case when a defendant seeks first-tier review in the Michigan Court of Appeals.

Thus, this precedent does not support a claim that a reasonable jurist could conclude that the rule of *Halbert* was not compelled. To the contrary, "[t]he Michigan Supreme Court's reading [of] *Ross* to permit the denial of counsel to an indigent defendant on appeal solely because the appeal is discretionary [is] not a reasonable application of Supreme Court precedent." *Bulger v Curtis*, 328 F Supp 2d 692, 702 (ED Mich, 2004). Because I believe that the rule of *Halbert* was, in fact, compelled by precedent, I believe that the rule is not new. Thus, *Halbert* should apply retroactively. Even if the rule of *Halbert* were new, it would represent a "watershed" decision, which requires retroactive application under *Teague*. *Teague* states that "a new rule should be applied retroactively if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 US at 307, 311 (opinion of O'Connor, J.) (citations omitted). At issue here is meaningful access to the courts, *Ross*, 417 US at 615, and the essential fairness of state-ordered proceedings, *Halbert*, 545 US at 611. I believe that these are matters that are "implicit in the concept of ordered liberty."

The majority supports its finding to the contrary with the assertion that a state is not required to provide "any appellate proceedings at all for defendants who plead guilty." Again, the United States Supreme Court rejected this reasoning in *Halbert*. The Court reminded

that while "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," nonetheless, once provided, "a State may not bolt the door to equal justice to indigent defendants." *Halbert*, 545 US at 610 (internal citations and quotation marks omitted). I conclude that the rule of *Halbert* fits this exception to *Teague*. It should apply retroactively.

This conclusion is supported by the fact that *Douglas*, the case on which the United States Supreme Court based its *Halbert* decision, was applied retroactively. *McConnell v Rhay*, 393 US 2, 3; 89 S Ct 32; 21 L Ed 2d 2 (1968). Observing this application, the Supreme Court grouped *Douglas* with *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), as cases implicating the right to counsel and addressing a right that "relates to the very integrity of the fact-finding process." *McConnell*, 393 US at 3 (internal citation and quotation marks omitted). Thus, the majority opinion's attempt to distinguish this case from the sort that announces a "watershed" rule is incorrect. *Ante* at 391-392. *Douglas* was decided on equal protection and due process grounds, just like *Halbert*. Yet the Supreme Court identified *Douglas* as implicating the same right as *Gideon* under a different constitutional provision. Thus, *Douglas* would suggest that, under *Teague*, *Halbert* is a "watershed" rule requiring retroactive application irrespective of the specific constitutional ground on which it was decided.

But, as noted, *Teague* does not control the measure of retroactivity applied by a state court. Rather, Michigan jurisprudence provides the tools for assessment in this case.[1] The majority applies the factors stated in *People*

[1] I am aware of the decision in *Simmons v Kapture*, 516 F3d 450 (CA 6, 2008). I am also aware that the petition for writ of certiorari was denied

v Sexton, 458 Mich 43, 580 NW2d 404 (1998), to conclude that retroactivity is not required in this case. I believe that the *Sexton* factors direct the opposite result.

The first *Sexton* factor, the purpose factor, states that a law may be applied retroactively when it "concerns the ascertainment of guilt or innocence"; however, "a new rule of procedure . . . which does not affect the integrity of the fact-finding process should be given prospective effect." *Id*. at 63 (citations and quotation marks omitted). The majority concludes that this factor is inapplicable because "the appointment of counsel on appeal does not concern the ascertainment of guilt or innocence." *Ante* at 393-394. I strongly disagree. I believe the ascertainment of guilt or innocence is at stake here because " 'a correct adjudication of guilt' involves more than just an admission of guilt." *Bulger*, 462 Mich at 560 (CAVANAGH, J., dissenting); see also MCR 6.302. "Appeals after guilty pleas, too, directly implicate a procedure without which the accuracy of a conviction cannot be assured." *Simmons v Kapture*, 516 F3d 450, 457 (CA 6, 2008) (Martin, J., dissenting), citing *Halbert*, 545 US at 617. *Halbert* rests precisely on the fact that a defendant's first-tier appeal from a plea-based conviction involves error-correction. In other words, a defendant's guilt or innocence is at stake. Thus, the purpose prong directs retroactive application of *Halbert*.

I observe further that the majority opinion relies on the presumption that all defendants who plead guilty are indeed guilty. *Ante* at 394. As I pointed out in *Bulger*, this misses the entire purpose of a first-tier appeal from a guilty plea, where factors relevant to

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in *Houlihan v Michigan*, ___ US ___; 129 S Ct 254; 172 L Ed 2d 191 (2008). As noted earlier, these decisions do not prohibit or affect the application of state law to this case.

guilt—such as coercion, ineffective assistance of counsel, and mental capacity—are meant to be adjudicated.[2] Correcting these errors is relevant precisely to the question of guilt or innocence. In *McConnell*, *supra*, the United States Supreme Court stated the significance of the issue at stake:

> This Court's decisions on a criminal defendant's right to counsel at trial, *Gideon v. Wainwright*, 372 US 335 (1963); at certain arraignments, *Hamilton v. Alabama*, 368 US 52 [82 S Ct 157; 7 L Ed 2d 114] (1961); and on appeal, *Douglas v. California*, 372 US 353 (1963), have been applied retroactively. The right to counsel at sentencing is no different. As in these other cases, the right being asserted relates to the very integrity of the fact-finding process. [*McConnell,* 393 US at 3 (citations and quotation marks omitted).]

The Supreme Court in *Halbert* observed that the error-correction function of a first-tier review in the Michigan Court of Appeals was crucial to its conclusions in that case. *Halbert*, 545 US at 617. Where the very integrity of the fact-finding process is at stake, retroactive application is directed. Further, the majority's position here is another way of stating that a defendant who pleads guilty accedes to the state's interest in finality, a proposition the United States Supreme Court rejected in *Halbert*. *Id*. at 623-624.

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[2] In greater detail, I stated that appeal from a plea-based conviction may involve

> constitutional defects that are irrelevant to [a defendant's] factual guilt, double jeopardy claims requiring no further factual record, jurisdictional defects, challenges to the sufficiency of the evidence at the preliminary examination, preserved entrapment claims, mental competency claims, factual basis claims, claims that the state had no right to proceed in the first place, including claims that a defendant was charged under an inapplicable statute, and claims of ineffective assistance of counsel. [*Bulger*, 462 Mich at 561 (CAVANAGH, J., dissenting) (citations omitted).]

The second *Sexton* factor is also implicated. This factor addresses the "general reliance on the old rule." *Sexton*, 458 Mich at 60. Addressing this factor, the *Sexton* Court stated that "[j]udicial decisions are generally given complete retroactive effect unless the decisions are unexpected or indefensible." *Id*. at 63-64, citing *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996). As exhaustively demonstrated in *Halbert*, this rule is neither "unexpected" nor "indefensible."

In this case, injustice will result if *Halbert* is not applied retroactively. The majority's decision in *Bulger* left indigent defendants who pleaded guilty with a "meaningless ritual in our Court of Appeals." *Bulger*, 462 Mich at 581 (CAVANAGH, J., dissenting). Failure to apply *Halbert* retroactively means that for a "small group of people arbitrarily caught between Michigan's own protections [before 1994] and the protection offered by *Halbert*, the 'meaningless ritual' of indigent appeals continues to be a harsh and unjust reality . . . ." *Simmons*, 516 F3d at 458 (Martin, J., dissenting). As the United States Supreme Court stated in *Douglas*, the case on which it relied for the rule of *Halbert*, "When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps." *Douglas*, 372 US at 358 n 2 (citation and quotation marks omitted). Unless *Halbert* is applied retroactively, defendants whose plea-based convictions became final during the arbitrary period between 1994 and 2005 will be penalized by the general reliance on an unconstitutional ruling of this Court. The second factor of *Sexton* directs retroactive application of *Halbert*.

Finally, the effect on the administration of justice, the third *Sexton* factor, requires retroactive application. The very system of justice administered by this Court rests on the fair application of fundamental rights, such

as the right to counsel on first-tier appellate review. As the Supreme Court observed in *Douglas*:

> "No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." [*Douglas,* 372 US at 358 n 2, quoting *Coppedge v United States*, 369 US 438, 449; 82 S Ct 917; 8 L Ed 2d 21 (1962).]

The majority concludes that the effect on the administration of justice counsels against retroactivity because "[t]he state's strong interest in finality of the criminal justice process would be undermined." *Ante* at 397. In *Halbert*, the United States Supreme Court found this argument insufficient to support the denial of appellate counsel to defendants who had pleaded guilty. *Halbert*, 545 US at 623. Further, the majority's contention that retroactive application of *Halbert* would "inundate the appellate process with new appeals" is speculative. *Ante* at 398. As the majority observes, only a small percentage of defendants who pleaded guilty availed themselves of appointed counsel to seek an appeal before such appointment was precluded by the unconstitutional rule of MCL 770.3a. *Ante* at 396-397. Also, appointed counsel would be prohibited from asserting frivolous claims for appeal by Rule 3.1 of the Michigan Rules of Professional Conduct. And the Court of Appeals retains discretion on whether to grant leave to hear appeals from guilty pleas.[3] Const 1963, art 1, § 20. Finally, as the majority also observes, a defendant

[3] Of course, as an error-correcting court, the Court of Appeals must conduct some analysis of each application for leave to appeal before exercising its discretion on whether to hear each case. This analysis is evidently less burdensome than actually hearing an appeal. Additionally,

must consider the risk that an adverse ruling on appeal may result in a more severe penalty. *Ante* at 395; MCR 6.312. Together, these factors suggest that only a small number of cases with genuine and substantial issues for appeal will receive full consideration by our state appellate courts. But even if the number of appeals would be great, as the majority speculates, defendants validly asserting claims of substantial error should be heard in our appellate courts.

It strikes me as an ironic twist to apply the invalid reasoning that the majority originally used in attempting to justify denying these defendants their constitutional right to now deny them review retroactively. I see no reason to deny constitutional rights to defendants on the arbitrary basis that their convictions became final between 1994 and 2005. On the contrary, I believe that failure to apply the rule of *Halbert* retroactively is unreasonable and constitutionally unconscionable. I must respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

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the Court would have the advantage of reviewing arguments that have been researched and briefed by counsel.

UNITED STATES FIDELITY INSURANCE & GUARANTY COMPANY
v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION
HARTFORD INSURANCE COMPANY OF THE MIDWEST
v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION

Docket Nos. 133466 and 133468. Argued October 1, 2008 (Calendar No. 5). Decided December 29, 2008.

United States Fidelity Insurance & Guaranty Company (USF&G) and Hartford Insurance Company of the Midwest (Hartford) filed separate actions in the Oakland Circuit Court seeking declaratory judgments that, under MCL 500.3104, the Michigan Catastrophic Claims Association (MCCA) was required to reimburse them for payments of personal protection insurance benefits above the statutory threshold made to insureds who suffered catastrophic injuries, regardless of whether the charges were reasonable. With respect to USF&G, the trial court, Steven N. Andrews, J., agreed that the MCCA was required to indemnify USF&G for the actual amount it had paid regardless of whether the charges were reasonable. The MCCA appealed. In the case of Hartford, the trial court, Rudy J. Nichols, J., ruled that the MCCA could challenge the reasonableness of the charges as a defense to a claim for indemnification, and Hartford appealed. After consolidating the cases, the Court of Appeals, OWENS, P.J., and WHITE and HOEKSTRA, JJ., affirmed with respect to USF&G and reversed with respect to Hartford, holding that MCL 500.3104 unambiguously requires the MCCA to reimburse insurers for the full amount of personal protection insurance benefits exceeding the statutory threshold that the insurer was obligated to pay to its insured, regardless of whether the amount was reasonable. 274 Mich App 184 (2007). The Supreme Court granted leave to appeal. 481 Mich 862 (2008).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN, the Supreme Court *held*:

When a member insurer's policy provides coverage only for reasonable charges, the MCCA has the authority to refuse to indemnify unreasonable charges; if the policy provides broader coverage, the MCCA must review for compliance with the broader coverage and indemnify claims within that coverage, but it may reject claims in excess of that coverage.

1. The Legislature granted the MCCA the authority to perform any act necessary or proper to accomplish its purpose that is not inconsistent with MCL 500.3104 or the MCCA's plan of operation. This authority includes the power to review member insurer claims to ensure that they meet the three requirements for indemnification set forth in MCL 500.3104(2), which are that the claim is for the ultimate loss, that the claim was sustained under personal protection insurance coverages, and that the loss was in excess of the statutory threshold. If a claim does not meet the statutory requirements, the MCCA may reject it.

2. "Personal protection insurance coverages" refers to the no-fault personal protection insurance coverages that are generally the subject of the no-fault act. "Coverage" refers to protection afforded by an insurance policy or the sum of risks assumed by an insurance policy. Thus, the terms of the underlying no-fault policy control the standard for the MCCA's review, and neither a settlement agreement nor a consent judgment modifies that standard.

3. No-fault policies written in Michigan must, at a minimum, provide personal protection insurance benefits that include reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. It follows that the losses sustained under personal protection insurance coverages will minimally include reasonable charges, although insurers may provide broader coverage and greater benefits than the no-fault statute requires. Accordingly, claims that exceed the member insurer's personal protection insurance coverages do not trigger the MCCA's obligation to indemnify 100 percent of the claimed loss, because such claims were not sustained under personal protection insurance coverages as MCL 500.3104(2) requires. Rather, the MCCA is only obligated to indemnify 100 percent of that portion of the claimed loss that meets all three statutory requirements.

Reversed and remanded to the circuit court.

Justice MARKMAN, concurring, agreed fully with the majority opinion, and wrote separately to explain that the MCCA's reimbursement responsibilities must be determined by the "coverages" in member insurers' initial insurance policies, rather than in a settlement agreement or consent judgment, in order to be consistent with MCL 500.3104(7)(d), which requires the MCCA to calculate and impose a premium on member insurers that is sufficient to cover its expected losses and expenses.

Justice WEAVER, joined by Justices CAVANAGH and KELLY, dissenting, would hold that the indemnification obligation set forth in MCL 500.3104(2) does not incorporate the reasonableness stan-

dard that MCL 500.3107 requires between claimants and member insurers; that the MCCA has the power to adjust only the practices and procedures of its member insurers, not the payment amounts or the reasonableness of claims; and that the MCCA's powers are limited to furthering the MCCA's purposes, which do not include determining the reasonableness of claims.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — CATASTROPHIC CLAIMS — INDEMNIFICATION.

The Michigan Catastrophic Claims Association has the authority to refuse to indemnify unreasonable charges for personal protection insurance benefits if the member insurer's policy provides coverage only for reasonable charges (MCL 500.3104).

Plunkett Cooney (by *Jeffrey C. Gerish* and *Gregory Gromek*) for United States Fidelity & Guaranty Insurance Company.

Stark Reagan, P.C. (by *Ava K. Ortner*), and *Dykema Gossett PLLC* (by *Joseph K. Erhardt*, *Jill M. Wheaton*, and *K.J. Miller*) for the Michigan Catastrophic Claims Association.

Miller & Tischler, P.C. (by *Milea M. Vislosky*), for Michael Migdal.

Secrest Wardle (by *Janet Callahan Barnes* and *John H. Cowley, Jr.*) for The Hartford Insurance Company of the Midwest.

Amici Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), and *Sinas Dramis Brake Boughton & McIntyre PC* (by *George T. Sinas* and *Steven A. Hicks*) for the Coalition Protecting Auto No-Fault.

Hackney, Grover, Hoover & Bean, PLC (by *John P. Lewis*), for State Farm Mutual Automobile Insurance Company.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *William A. Chenoweth*, Assistant Attorney General, for the Commissioner of the Office of Financial and Insurance Regulation.

John A. Lydick for the Insurance Institute of Michigan.

YOUNG, J. This Court must determine whether the Michigan Catastrophic Claims Association (MCCA) has authority to refuse to indemnify member insurers for unreasonable charges. In these consolidated appeals, the MCCA refused to indemnify its member insurers, United States Fidelity Insurance & Guaranty Company (USF&G) and Hartford Insurance Company of the Midwest (Hartford) (together, plaintiffs), for personal protection insurance (PIP) benefits[1] in excess of $250,000.[2] The MCCA claimed that the hourly rates for attendant care services agreed to by plaintiffs were unreasonable and that it was not required to reimburse member insurers for unreasonable payments. Plaintiffs argued that the MCCA lacked authority to refuse to indemnify their claims on the grounds that the charges they paid were unreasonable. We hold that when a member insurer's policy only provides coverage for "reasonable charges,"[3] the MCCA has authority to refuse to indemnify unreasonable charges. Accordingly, we reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

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[1] "What are commonly called 'PIP benefits' are actually personal protection insurance (PPI) benefits by statute. However, lawyers and others call these benefits PIP benefits to distinguish them from property protection insurance benefits." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66-67 n 4; 737 NW2d 332 (2007) (citation omitted).

[2] See MCL 500.3104(2)(a).

[3] MCL 500.3107(1)(a).

I. FACTUAL BACKGROUND

A. USF&G v MCCA, DOCKET NO. 133466

USF&G provided no-fault insurance coverage for Daniel Migdal, who was injured in a motor vehicle accident on August 22, 1981. Since his injury, Daniel has required 24-hour attendant care services.

In 1988, Daniel's father, Michael Migdal, individually and as conservator of Daniel's estate, filed a first party no-fault action against USF&G, seeking to recover attendant care benefits. In 1990, the parties entered into a consent judgment that provided that USF&G would pay $17.50 an hour for attendant care services with an adjustment for inflation of 8.5 percent compounded annually.[4]

The increased payments occasioned by this consent judgment have, in turn, driven this litigation. As of 2003, when this suit was filed, USF&G was paying $54.84 an hour to Medical Management, a company started by Mr. Migdal to provide his son's care. Medical Management paid the nurses who actually provided Daniel's care between $21.00 and $25.00 an hour plus benefits, which raised the average hourly nursing care cost to $32 an hour. As a result, the consent judgment created a profit center for Mr. Migdal. Medical Management kept the remainder of the hourly rate paid by USF&G and recovered approximately $200,000 in profits for 2003 for its operation.

The pay rate has continued to increase and, after Daniel's benefits exceeded the $250,000 MCCA statutory threshold,[5] USF&G sought indemnification from

[4] The adjustment was the result of extended negotiations and compromise. At the time of the settlement negotiations (the late 1980s), the cost of medical care was rising at a rate of over 10 percent annually.

[5] MCL 500.3104(2)(a). The threshold has since been increased to $440,000. MCL 500.3104(2)(h).

the MCCA under MCL 500.3104. The MCCA, however, refused to reimburse USF&G beyond $22.05 an hour, a rate that it considered reasonable.

B. HARTFORD v MCCA, DOCKET NO. 133468

Hartford provided no-fault insurance coverage for Robert Allen, who was injured in a motor vehicle accident on November 6, 2001. Allen was prescribed 24-hour attendant care services. Hartford initially paid for those services at the rate of $20 an hour.

In 2003, Allen retained an attorney and demanded that Hartford pay $37 an hour for attendant care services. The parties entered into a settlement agreement that provided that Hartford would pay $30 an hour for three years (May 6, 2003, to May 6, 2006).

Hartford sought indemnification from the MCCA under MCL 500.3104 because its payments to Allen exceeded the $250,000 threshold. The MCCA contested the reasonableness of the hourly rate and refused to reimburse Hartford beyond a rate of $20 an hour.

II. PROCEDURAL HISTORY

USF&G and Hartford each filed a complaint for a declaratory judgment against the MCCA.[6] Each plaintiff requested that the circuit court order the MCCA to reimburse the full rate of the attendant care services each insurer was paying its insured.

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[6] USF&G also sought reformation of its consent judgment with Mr. Migdal. The court granted Mr. Migdal summary disposition under MCR 2.116(C)(8). USF&G did not file a claim of appeal from that order. Although Mr. Migdal filed a brief in this Court responding to this Court's order granting leave to appeal, see n 13 *infra*, the time for appealing the circuit court's order dismissing Mr. Migdal has expired, see MCR 7.205(F)(3), and Mr. Migdal is not a party to these proceedings.

The parties filed motions for summary disposition under MCR 2.116(C)(9) and (10),[7] disputing whether the MCCA could refuse to reimburse payments that it deemed unreasonable. The circuit courts entered conflicting judgments. In USF&G's case, the court entered summary disposition in USF&G's favor. The court held that MCL 500.3104 does not include a reasonableness requirement and the court could not add one; thus, USF&G was entitled to summary disposition because the MCCA's argument lacked merit. In Hartford's case, the court denied Hartford's motion for summary disposition. The court held that the MCCA could refuse to reimburse unreasonable charges and that whether the charges in that case were reasonable was a question of fact.[8]

The MCCA appealed the grant of summary disposition in USF&G's favor, and Hartford appealed the denial of its motion. The Court of Appeals consolidated the appeals and held that "the MCCA is statutorily required to reimburse an insurer for 100 percent of the amount that the insurer paid in PIP benefits to an insured in excess of the statutory threshold listed in MCL 500.3104(2), regardless of the reasonableness of these payments."[9] The Court of Appeals majority explained that "[a]lthough MCL 500.3105 and MCL 500.3107 indicate that an insurer is only required to reimburse an insured for reasonable charges, MCL

[7] The court in USF&G's case declined to review the case under MCR 2.116(C)(9) because the parties relied on matters outside the pleadings. MCR 2.116(G)(5).

[8] Because USF&G's motion was granted before the court had ruled on Hartford's motion, the court in Hartford's case was aware of that ruling and distinguished USF&G's case as involving a consent judgment instead of a settlement agreement.

[9] *US Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 192; 731 NW2d 481 (2007).

500.3104 does not include a reasonableness requirement."[10] Thus, the majority concluded that "MCL 500.3104 requires the MCCA to reimburse the insurer for the full amount (above the statutory threshold) of PIP benefits that the insurer is bound to pay to its insured, regardless of the circumstances under which that amount was determined, whether by agreement, judgment, binding arbitration, or otherwise, or the reasonableness of that amount."[11] Accordingly, the Court of Appeals affirmed the grant of summary disposition in USF&G's favor, and reversed the denial of Hartford's motion.[12]

This Court granted the MCCA's applications for leave to appeal in both cases and asked the parties to address "whether MCL 500.3104(2) obligates the [MCCA] to reimburse member insurers' reimbursement claims without regard to the reasonableness of the member's payments to PIP claimants."[13]

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[10] *Id.* at 197.

[11] *Id.*

[12] Judge WHITE concurred and, noting that there were no allegations of bad faith by the insurers, added:

> Under the statutory framework, the determination of reasonableness is to be made by the insurer, or the judicial system after litigation. . . . The statute does not contemplate that the MCCA will become a party to the insurance contract, or possible litigation, between the insured and the insurer, with a voice regarding whether a lesser or greater sum is reasonable under MCL 500.3107. Nor does it contemplate that the MCCA will act as a de facto regulatory body, determining what amounts are reasonable for which services. [*Id.* at 205-206 (WHITE, J., concurring).]

[13] *US Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 481 Mich 862 (2008). The order additionally asked the parties to consider:

> (1) Whether factors to consider in determining whether the MCCA is precluded from questioning the reasonableness of the

III. STANDARD OF REVIEW

This Court reviews decisions to grant or deny summary disposition de novo.[14] Addressing the issues presented in this case requires that this Court interpret MCL 500.3104. Issues of statutory interpretation are questions of law that this Court reviews de novo.[15]

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reimbursement claims in these cases include the MCCA's failure to exercise to their full extent, before entry of the consent judgment in Docket No. 133466 and the settlement agreement in Docket No. 133468, its powers under MCL 500.3104(7)(b) and (g) to:

(a) require notice of claims likely to involve the MCCA;

(b) require notice of subsequent developments likely to materially affect the MCCA's interests;

(c) establish claims procedures and practices for MCCA members; and,

(d) if the MCCA considers a member's claims procedures and practices inadequate, to undertake to adjust or assist in adjusting the claim, at the member's expense, so as to ensure that member claims submitted to the MCCA for reimbursement are, in fact, reasonable; and

(2) Whether, like the terms of declaratory judgments pertaining to PIP benefits payable in the future, the terms of consent judgments and settlement agreements pertaining to PIP benefits that embody terms that prove over time to call for reimbursement at a rate higher than the actual cost incurred are subject to:

(a) reduction based on the requirement that an expense must be actually incurred before a no-fault insurer is obliged to pay it; and

(b) redetermination from time to time of the amounts properly allowable, based on a change in facts or circumstances after entry of the consent judgment or settlement agreement. Cf. *Manley v DAIIE*, 425 Mich 140, 157 (1986); *Proudfoot v State Farm Mut Ins Co,* 469 Mich 476, 483-484 (2003).

[14] *Lash v Traverse City*, 479 Mich 180, 186; 735 NW2d 628 (2007).

[15] *Id*.

"When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language."[16] "In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' As far as possible, effect should be given to every phrase, clause, and word in a statute."[17]

IV. ANALYSIS

The parties dispute whether the MCCA may review the reasonableness of charges for attendant care services and refuse to indemnify a member insurer when it deems those charges unreasonable.

A. WHETHER THE MCCA HAS AUTHORITY TO REVIEW AND REJECT MEMBER CLAIMS

The narrower threshold issue is whether the Legislature intended to permit the MCCA to conduct *any* review of claims submitted by member insurers. As stated, the language of the statute is the starting point to determine legislative intent. MCL 500.3104 does not expressly authorize the MCCA to review claims submitted by member insurers. MCL 500.3104(8)(g), however, does provide a broad grant of authority to the MCCA:

> (8) In addition to other powers granted to it by this section, the association may do all of the following:
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> * * *

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[16] *Id.* at 187.

[17] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

(g) Perform other acts not specifically enumerated in this section that are necessary or proper to accomplish the purposes of the association and that are not inconsistent with this section or the plan of operation.

Accordingly, the MCCA may perform any act "necessary or proper to accomplish" its purpose that is not inconsistent with § 3104 or its plan of operation.

This Court has explained the MCCA's purpose:

> It was created by the Legislature in 1978 in response to concerns that Michigan's no-fault law provision for unlimited personal injury protection benefits placed too great a burden on insurers, particularly small insurers, in the event of "catastrophic" injury claims. Its primary purpose is to indemnify member insurers for losses sustained as a result of the payment of personal protection insurance benefits beyond the "catastrophic" level, which has been set at $250,000 for a single claimant. * * * In practice, the [MCCA] acts as a kind of "reinsurer" for its member insurers.[18]

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[18] *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, 433 Mich 710, 714-715; 449 NW2d 660 (1989). This Court further explained the policy underlying the statute:

> The Legislature recognized that while such claims might be rare, they are also unpredictable, and equally as likely to strike a small or medium-sized insurer as they are a large insurer. The obvious problem is that the small or medium-sized companies have substantially fewer cars over which to spread the costs of potential losses, which means that the costs of providing unlimited medical and other benefits is higher per car for such companies, putting them at a competitive disadvantage in the state's insurance market. In addition to this competitive disadvantage, the Legislature considered the practical "business difficulties" confronting all insurers as a result of such possible catastrophic claims, such as the difficulty in determining the amount of reserves to keep on hand.
>
> It was thought that the creation of such an association of insurers would alleviate the competitive inequity of these catastrophic claims by spreading their cost throughout the industry, and also increase the statistical basis for prediction of the overall

Not every member insurer claim is entitled to indemnification under § 3104(2). Section 3104(2) obligates the MCCA to indemnify member insurers as follows:

> The [MCCA] shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of [$250,000].[19]

"Ultimate loss" is defined as "the actual loss amounts that a member is obligated to pay and that are paid or payable by the member, and do not include claim expenses."[20] Therefore, incorporating that definition, the statute provides that "[The MCCA] shall provide and each member shall accept indemnification for 100% of the amount of [the actual loss amounts that a member is obligated to pay and that are paid or payable by the member] sustained under personal protection insurance coverages in excess of [$250,000]."

Each claim must meet the requirements of § 3104(2). First, the claim sought to be indemnified must be for the "ultimate loss," i.e., "the actual loss amounts that a member is obligated to pay and that are paid or payable by the member." Second, the claim must be "sustained under personal protection insurance coverages." And third, the loss must be in excess of the statutory threshold.[21] The MCCA's obligation to indemnify

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cost of such claims, making the management of these liabilities easier. See House Legislative Analysis, SB 306, March 13, 1978. [*In re Certified Question*, *supra* at 714 n 2.]

[19] The threshold loss amount is determined by the date the policy was issued or renewed. The subject policies of these appeals were "issued or renewed before July 1, 2002." MCL 500.3104(2)(a). Thus, the relevant threshold loss amount for these appeals is $250,000. *Id.* The current threshold is $440,000. MCL 500.3104(2)(h).

[20] MCL 500.3104(25)(c).

[21] See MCL 500.3104(2)(a)-(k).

"100%" of the loss is not triggered unless the member insurer's claim meets all three requirements.

The Legislature has made policy judgments in setting out these requirements. It has determined that only certain, limited claims are "catastrophic" and require "reinsurance" to alleviate the burden placed on insurers providing no-fault coverage. Thus, it is "necessary or proper to accomplish the [MCCA's] purposes" and "not inconsistent with [§ 3104]" for the MCCA to review member insurer claims to ensure that they meet the requirements of § 3104(2).

Review of member insurer claims is also consistent with the MCCA's plan of operation, which, since its original plan of operation in 1978, has provided: "The Association shall, *upon verification of the propriety and amount of the payments made and the member's entitlement to reimbursement therefor*, reimburse the member the amount due it." (Emphasis added.)

Moreover, in *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, this Court implicitly answered in the affirmative whether review of member claims is permitted.[22] There, the plaintiff, Preferred Risk, was a member insurer that insured an Illinois resident under a policy written in Illinois. The insured was catastrophically injured in an automobile accident in Michigan. The plaintiff sought indemnification for its losses in excess of the $250,000 statutory threshold.[23] The MCCA denied the plaintiff's application for indemnification on the basis that the insured was not a "resident."[24] This Court held that the

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[22] *In re Certified Question*, *supra* at 723.

[23] MCL 500.3163(1) obligated the plaintiff to provide Michigan no-fault benefits.

[24] The MCCA defined "resident" as "all owners or registrants of motor vehicles required to be registered [in Michigan] . . . ." *In re Certified Question*, *supra* at 719.

indemnification requirement of § 3104(2) only applied to "a policy which was written in this state to provide the security required by § 3101(1) of the no-fault act . . . ."[25] Thus, this Court implicitly held that the MCCA could review claims to determine whether the member insurer is entitled to indemnification because the Court endorsed the MCCA reviewing the residency of the insured.

In addition, *In re Certified Question* supports the proposition that the MCCA may refuse to indemnify claims that do not meet the requirements of § 3104(2).[26] Concomitant with the absence of an obligation to indemnify is the authority to act accordingly and reject claims that do not meet the requirements of § 3104(2). Indeed, such authority to reject is "necessary or proper to accomplish" the MCCA's purpose and not inconsis-

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[25] *Id.* This Court, determining that the statute controlled over the MCCA's definition of "resident," held that the statute nonetheless contained a parallel provision to the MCCA's definition of "resident." As we will discuss, this Court explained that "personal protection insurance coverages," as used in MCL 500.3104(2), refers to policies providing "the compulsory security requirements of [MCL 500.3101(1)]," i.e., " 'residents,' in the language of the [MCCA's] plan of operation." *In re Certified Question*, *supra* at 723.

[26] See also *Liberty Mut Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 42; 638 NW2d 155 (2001) (holding that the MCCA was not obligated to indemnify a claim under a California automobile insurance policy that was reformed into a Michigan no-fault automobile insurance policy five years after the subject accident, and stating that "the MCCA can refuse to indemnify claims paid under MCL 500.3163"); *Farmers Ins Exch v South Lyon Community Schools*, 237 Mich App 235, 238 n 1; 602 NW2d 588 (1999) ("[T]he MCCA is not obligated to indemnify its member insurers for amounts the insurers are not obligated to pay under their no-fault policies."); *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514; 509 NW2d 540 (1993) (holding that the MCCA was not obligated to indemnify a claim submitted by two insurers seeking to aggregate their shared losses to exceed the $250,000 threshold); *J C Penney Cas Ins Co v Michigan Catastrophic Claims Ass'n*, 177 Mich App 538 (1989), aff'd 434 Mich 901 (1990) (holding that the plaintiff insurer was not entitled to reimbursement from the MCCA).

tent with either § 3104 or the MCCA's plan of operation.

Accordingly, we hold that MCL 500.3104(8)(g) permits the MCCA to review claims submitted by member insurers and reject those that do not meet the requirements of § 3104(2). That leads to the dispositive issue whether that authority permits the MCCA to review the reasonableness of charges for attendant care services and refuse to indemnify a member insurer when it deems those charges unreasonable.

B. WHETHER THE MCCA MAY REVIEW THE REASONABLENESS OF ATTENDANT CARE CHARGES AND REFUSE TO INDEMNIFY UNREASONABLE CHARGES

Plaintiffs argue that § 3104(2) does not contain a "reasonableness" requirement and, instead, focus on the fact that they suffered an "actual loss" due to an "obligation." Plaintiffs also emphasize the term "100%" in § 3104(2) and argue that if the MCCA indemnifies less than the full amount of their claim, it is not meeting its statutory obligation.

Indeed, § 3104(2) does not contain the word "reasonable" or any variation thereof, and plaintiffs have paid their insureds subject to their obligations under a consent judgment and settlement agreement, respectively. Plaintiffs' arguments, however, ignore the second requirement of § 3104(2)—that the claim must be "sustained under personal protection insurance coverages."

In *In re Certified Question*, this Court held that

> the reference to "personal protection insurance coverages" under which the [MCCA] may be liable for indemnification in the event of a catastrophic loss . . . is a shorthand reference to the no-fault personal protection insurance coverages that are generally the subject of the act, i.e., those which were written in this state to provide the

> compulsory security requirements of § 3101(1) of the no-fault act for the "owner or registrant of a motor vehicle required to be registered in this state" . . . .[27]

Policies written in this state to provide the compulsory security requirements of § 3101(1) must comply with the provisions of the no-fault act. MCL 500.3105(1) obligates a member insurer to pay PIP benefits.[28] MCL 500.3107(1)(a) defines PIP benefits, in relevant part, as "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Thus, a no-

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[27] *In re Certified Question*, *supra* at 723. Plaintiffs argue that this statement is obiter dictum. " 'Obiter dictum' is defined as '[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . .' " *People v Williams*, 475 Mich 245, 251 n 1; 716 NW2d 208 (2006), quoting Black's Law Dictionary (7th ed). As stated, *In re Certified Question* held that § 3104(2) only applied to "a policy which was written in this state to provide the security required by § 3101(1) of the no-fault act." *In re Certified Question*, *supra* at 719. The Court's interpretation of "personal protection insurance coverages" was not unnecessary. Rather, it directly reflects the holding.

The dissent cites *In re Certified Question* for several propositions of law, but distinguishes its holding. Despite conceding that § 3104(2) imposes three *requirements* that a member insurer's claim must meet, the dissent nonsensically asserts that the MCCA is without authority to determine whether a claim complies with § 3104(2). *Post* at 448-450 n 15. The dissent's position is fallacious on its face; it would rob any meaning from what the dissent concedes are requirements for indemnification. Moreover, the dissent attempts to limit the holding in *In re Certified Question* to noncompliance with § 3104(2) that is "objectively clear." *Post* at 449 n 15. Nothing in *In re Certified Question* suggests such a limitation. Rather, *In re Certified Question* plainly held that the MCCA is not required to indemnify a claim that does not meet the requirements of § 3104(2); we do the same today.

[28] MCL 500.3105(1) provides: "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter."

fault policy written in this state must, at a minimum, provide PIP benefits that include "*reasonable charges* incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." It follows that the losses "sustained under personal protection insurance coverages" will *minimally* include "reasonable charges." Insurers are free to provide broader coverage and greater benefits than § 3107 provides.[29] Indeed, insurers may provide expanded coverage for actual or even unreasonable charges.[30] Thus, the member insurer's policy will ultimately control the standard for the

[29] See *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002) ("[W]here contract language is neither ambiguous, nor contrary to the no-fault statute, the will of the parties, as reflected in their agreement, is to be carried out, and thus the contract is enforced as written.").

[30] Of course, such practice may be subject to the MCCA's "takeover" authority under MCL 500.3104(7)(g), which provides:

> (7) The association shall do all of the following on behalf of the members of the association:
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> * * *
>
> (g) Establish procedures for reviewing claims procedures and practices of members of the association. If the claims procedures or practices of a member are considered inadequate to properly service the liabilities of the association, the association may undertake or may contract with another person, including another member, to adjust or assist in the adjustment of claims for the member on claims that create a potential liability to the association and may charge the cost of the adjustment to the member.

The dissent asserts that § 3104(7)(g) authorizes the MCCA "to adjust *only* 'procedures and practices' of the member that produce an unreasonable payment amount; the power does not include the power to adjust the amount." *Post* at 455-456. Section 3104(7)(g) permits the MCCA "to adjust or assist in the adjustment of *claims* for the member on claims that create a potential liability to the association . . . ." (Emphasis added.) As used in § 3104(7)(g), "adjust" means "[t]o settle or arrange; to free from differences or discrepancies. To bring to satisfactory state so that parties

MCCA's review because the policy establishes the "personal protection insurance coverages."[31]

Whether the subject charges fall within the terms of the individual policies that covered Daniel Migdal and Robert Allen is not before this Court. The parties have not litigated that issue and we are without the facts necessary to resolve it. The issue before this Court is whether the requirement that member insurer claims

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are agreed, as to adjust amount of loss by fire or controversy regarding property or estate. . . . Determination of amount to be paid to insured by insurer to cover loss or damage sustained." Black's Law Dictionary (5th ed); see also *Random House Webster's College Dictionary* (1997) ("to determine the amount to be paid in settlement of (an insurance claim)"). Contrary to the dissent's assertion, the MCCA's authority is not limited to adjusting the member insurer's "procedures and practices"; the MCCA is authorized to negotiate directly with the insured to reach a settlement of the claim and, under those circumstances, the MCCA is "adjusting" the amount. When it "adjusts" a claim, the MCCA is seeking to reduce its liability by preventing the member insurer from accepting excess liability. Invariably any adjustment will depend on the terms of the policy.

The instant cases are distinct from the norm, however. Here, plaintiffs agreed to certain payments in a consent judgment and a settlement agreement and remain bound by those agreements regardless whether the MCCA indemnifies the entire claim or invokes its "takeover" authority. Although member insurers are not "obligated" to pay their insureds until the claimed expense is actually incurred, see *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484 (2003), any opportunity to "adjust" Migdal's and Allen's claims and thereby reduce plaintiffs' liability before they become obligated is severely limited by the terms of their agreements.

[31] The dissent contends that the consent judgment and settlement agreement became "part of the insurer's coverage." *Post* at 448. The dissent's attempt to bootstrap the terms of the consent judgment and settlement agreement into the insureds' coverages is inconsistent with the dissent's own definition of "coverage," and is unpersuasive. We agree with the dissent that " 'coverage' refers to protection afforded by an insurance policy or the sum of risks assumed by an insurance policy." *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207, 217; 696 NW2d 621 (2005), citing *LeBlanc v State Farm Mut Auto Ins Co*, 410 Mich 173, 204; 301 NW2d 775 (1981). Thus, the terms of the *policy* control the standard for the MCCA's review.

be "sustained under personal protection insurance coverages" entitles the MCCA to refuse to indemnify unreasonable charges. We hold that when a member insurer's policy provides coverage only for "reasonable charges," the MCCA has authority to refuse to indemnify unreasonable charges. If the policy provides broader coverage, the MCCA must review for compliance with the broader coverage and indemnify claims within that coverage, but it may reject claims in excess of that coverage. Claims in excess of the member insurer's PIP coverages are not "sustained under personal protection insurance coverages." Thus, those claims do not meet the three statutory requirements of § 3104(2) and they do not trigger the MCCA's obligation to indemnify "100%" of the claimed loss. Rather, the MCCA is only obligated to indemnify "100%" of the portion of the claimed loss that meets all three requirements of § 3104(2). Accordingly, we remand these cases to the trial court to determine the PIP coverages provided by the individual policies at issue in these cases and, if appropriate, whether the attendant care charges were reasonable.[32]

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[32] Each party advances a policy argument in its favor. The MCCA argues that the no-fault system is intended keep automobile insurance costs affordable. See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 71-72; 718 NW2d 784 (2006) ("[A] dominant legislative purpose permeating throughout the no-fault act is to ensure that this mandatory coverage is affordable."). The premium the MCCA charges a member insurer is passed on to its insureds. See *In re Certified Question*, *supra* at 729; MCL 500.3104(22). As a result, the MCCA argues, if the MCCA must incur significant additional liability for "unreasonable charges," no-fault insurance costs will rise dramatically. In response, plaintiffs argue that no-fault insurance was intended to provide assured, adequate, and prompt payment. See *Shavers v Attorney General*, 402 Mich 554, 579-580; 267 NW2d 72 (1978) ("The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses."); MCL 500.3142. Plaintiffs argue that if the MCCA may reject member insurer claims on the basis of the

V. CONCLUSION

All member insurer claims must meet certain requirements of § 3104(2) to be entitled to indemnification from the MCCA. The MCCA may review those claims for compliance with § 3104(2) because such review is "necessary or proper to accomplish" the MCCA's purpose and is not inconsistent with § 3104 or the MCCA's plan of operation.[33] The MCCA may additionally reject claims that do not meet the requirements of § 3104(2).[34] One such requirement is that the claimed loss must be "sustained under personal protection insurance coverages."[35] A loss "sustained under personal protection insurance coverages" is one sustained under a policy providing "the compulsory security requirements of § 3101(1) . . . ."[36] Under § 3107(1)(a), such policies minimally include "*reasonable charges* incurred for reasonably necessary products, services and accommodations for an injured person's care, re-

reasonableness of the charges, member insurers will need to seek assurances that the MCCA will reimburse certain payments before making them, thus delaying payment.

Both policy arguments are compelling. It is not for this Court, however, to favor one policy objective over the other. "[P]olicy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589; 702 NW2d 539 (2005). The Legislature has made its policy choice. Given the text of MCL 500.3104(2), we believe that the Legislature intended to allow the MCCA to reject claims for charges in excess of the member's policy coverage. Thus, the parties' competing policy arguments are misplaced because this Court is without authority to replace the Legislature's choice with our own.

[33] MCL 500.3104(8)(g).

[34] *Id.*

[35] MCL 500.3104(2).

[36] *In re Certified Question*, *supra* at 723.

covery, or rehabilitation." When a member insurer's policy provides coverage consistent with MCL 500.3107(1)(a), the MCCA has authority to refuse to indemnify unreasonable charges. If the policy provides broader coverage, the MCCA may refuse to indemnify only charges in excess of that broader coverage.

We reverse the judgment of the Court of Appeals and remand these cases to the circuit court for proceedings consistent with this opinion.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

MARKMAN, J. (*concurring*). Although I fully agree with the majority opinion, I write separately to address what I think is its failure to fully explain why its definition of "personal insurance protection coverages," which is limited to a member insurer's initial insurance *policy*, is required by the statute. If the majority's definition is correct, the MCCA will often be allowed to review member claims for reasonableness because the policy itself will often limit claims to "reasonable" costs.[1] On the other hand, if the dissent is correct that settlement agreements and consent judgments are part of a member insurer's "coverages," and indeed may effectively become part of a member's "policy," then the MCCA will only rarely be allowed to review claims for reasonableness. The question then posed is which of these

[1] The dissent is correct that the reasonableness requirement of MCL 500.3107 is not integrated into the indemnification clause set forth in § 3104(2). *Post* at 457. However, the majority opinion does not attempt to incorporate this requirement into the MCCA's statutory power to review a member insurer's claim to ensure it is in compliance with the policy. Rather, it holds that the MCCA can review a member's claim for compliance *with the policy*, which, as represented by both parties, generally includes a requirement that member insurers reimburse only *reasonable* claims based on § 3107.

interpretations of "personal insurance protection coverages" is to be preferred under the law. In my view, the majority's assertion that "coverages" refers to the "policy," although ultimately the better definition, requires additional legal analysis.

The disputed statutory provision, MCL 500.3104(2), provides that "[the MCCA] shall provide and each member shall accept indemnification for 100% of the amount of the ultimate loss sustained under personal protection insurance coverages in excess of the [statutory threshold.]" In interpreting this language, our primary goal is to ascertain and give effect to the Legislature's intent. *McClellan v Collar (On Remand)*, 240 Mich App 403, 409; 613 NW2d 729 (2000). "As far as possible, effect should be given to every phrase, clause, and word in the statute." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

Here, the dissent has defined "coverages," in MCL 500.3104(2), as follows:

> Under the common meaning of "coverage," the contractual liability amount that an insurer agrees to pay an insured is considered a part of the insurer's coverage. [Black's Law Dictionary (5th ed).] USF&G and Hartford paid funds pursuant to a consent judgment and a settlement agreement with the respective insureds. This contractual liability, or coverage, owed by each insurer is the total amount agreed to between the original contracting parties. [*Post* at 448-450.]

Thus, the issue becomes whether "coverages" includes *any* contractual liability, which is properly insurable under the act, that a member insurer incurs at *any time*. The answer lies, I believe, in MCL 500.3104(7)(d), which requires that the MCCA,

> [i]n a manner provided for in the plan of operation, calculate and charge to members of the [MCCA] a total

> premium sufficient to cover the expected losses and expenses of the [MCCA] that the [MCCA] will likely incur during the period for which the premium is applicable.

This provision requires the MCCA to calculate premiums that it will charge to member insurers on the basis of the losses and expenses that the MCCA expects to incur. A principal component of this calculation is the frequency with which the MCCA will be required to reimburse member insurers for catastrophic claims, and for what amounts. Significantly, if a policy only requires a member insurer to pay "reasonable" claims, then the MCCA will charge a lower premium.

This conclusion is supported by two observations, which both assume a member's policy only requires "reasonable" payments in accordance with MCL 500.3107. First, where a member insurer only pays "reasonable" claims, a member will incur fewer claims that meet the catastrophic threshold for which the MCCA is required to provide reimbursement. Second, the MCCA will anticipate that, when a catastrophic claim *does* occur, any amount in excess of the statutory threshold will also be "reasonable." In other words, the MCCA's liability for reasonable claims will clearly be less than payments for unreasonable claims. As a result, the MCCA will charge a lower premium to member insurers if those member insurers pay only "reasonable" claims because the MCCA's "expected losses and expenses" will be less. Most importantly, the MCCA will only be able to determine the appropriate premiums that its member insurers must pay on the basis of their original policies.

The real question of interest then becomes what effect a subsequent settlement agreement or consent judgment that requires an arguably *unreasonable* payment will have on the MCCA's responsibility to reim-

burse claims under the original insurance policy for which it has already calculated and charged its premium. This depends on what, if any, effect these agreements have on the original policy. There are two plausible interpretations of what these types of agreements seek to accomplish. The first is that these are entirely new contracts, for which the member insurers have paid no premiums as contemplated by MCL 500.3104(7)(d). Under this interpretation, the member insurer will not have complied with the statute and will not be entitled to reimbursement from the MCCA. The second interpretation is that these agreements alter or modify the existing policy by further defining that policy's pre-existing terms (i.e., what is meant by the policy's requirement that a member insurer pay reasonable personal protection insurance benefits, as required by MCL 500.3107). Under this latter interpretation, if a settlement agreement purports to alter or modify the original policy, then the member insurer will have paid premiums to the MCCA *before* the accident has occurred. However, any such alteration or modification to a pre-existing policy cannot reasonably increase the MCCA's liability because a member will only have paid premiums based on the MCCA's assessment of the initial policy.

Liberty Mut Ins Co v Michigan Catastrophic Claims Ass'n, 248 Mich App 35; 638 NW2d 155 (2002), is instructive on this point. *Liberty Mut* examined a situation in which a member insurer had an insurance policy with an out-of-state driver who subsequently moved to Michigan and catastrophically injured a Michigan resident. The member insurer paid personal protection insurance benefits to the injured Michigan resident based on the out-of-state driver's policy, even though that policy at the time of the accident was *not* a Michigan policy. However, in order to be eligible for

MCCA reimbursement, the member insurer attempted to retroactively reform its policy, including remitting unpaid premiums, so as to comply with MCL 500.3104 before submitting its claim to the MCCA. Nevertheless, the MCCA rejected the member insurer's claim, and the Court of Appeals agreed, stating:

> If we were to accept plaintiff's argument, we would set a precedent by which an insurer could withhold premium payments for policyholders who moved to Michigan, then, upon a loss exceeding $250,000, the insurer could simply reform the contract, submit the previously due premium payments, and be reimbursed for claims paid in excess of $250,000. Under that situation, the MCCA would be deprived of premiums for policies on which no claims are made, thus defeating the "spread the risk" concept in insurance. [*Id*. at 47.]

This rationale applies with equal force to settlement agreements and consent judgments that attempt to retroactively increase the scope of a policy's coverage even *after a member insurer has paid its premiums* to the MCCA. Although the member insurers in the instant consolidated cases have paid part of their premiums to the MCCA, they have, in one sense, effectively "misrepresented" to the MCCA what amounts they would pay to their insured drivers in the event of a catastrophic claim. A member insurer that informs the MCCA that it will only pay "reasonable" claims, but then subsequently modifies the policy after the accident occurs to include unreasonable claims, has essentially sought reimbursement for claims for which it has not paid premiums.

Additionally, unlike the member insurer in *Liberty Mut*, the member insurers in this case sought to reform the policy without even purporting to pay the premiums that would have been owed. Such a practice defeats the very purpose of MCL 500.3104(7)(d) by denying the

MCCA the opportunity to impose a properly calculated premium, which is essential to the MCCA's ability (or indeed any insurer's ability) to collect sufficient premiums to further its "risk spreading" function. This is clearly contrary to the language of MCL 500.3104(7)(d), which requires the MCCA to impose a premium on a member insurer that is "sufficient to cover the expected losses and expenses of the [MCCA] that the [MCCA] will likely incur during the period for which the premium is applicable." As a result, the majority, in my judgment, correctly concludes that the statute requires that the original policy determine the MCCA's reimbursement responsibilities.

WEAVER, J. (*dissenting*). This Court granted leave to appeal to consider whether MCL 500.3104(2) obligates the Michigan Catastrophic Claims Association (MCCA) to reimburse a member insurer for personal protection insurance (PIP) benefits paid to a claimant without regard to the reasonableness of the member insurer's payments of PIP benefits.

I dissent and would hold that the indemnification obligation set forth in MCL 500.3104(2) does not incorporate the reasonableness standard that MCL 500.3107 requires between claimants and member insurers. Furthermore, the powers granted to the MCCA in § 3104(7) are limited to adjusting the "practices and procedures" of the member insurers and do not encompass adjustment to the payment amount agreed to between claimants and member insurers. Moreover, I would hold that the power granted to the MCCA under MCL 500.3104(8)(g) is limited to furthering the purposes of the MCCA, and that determining reasonableness is not one of its purposes. Finally, although the MCCA has no right to directly challenge the reasonableness of a claim, the no-fault statute does provide the MCCA with safe-

guards against negligent actions of member insurers. Accordingly, I would affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

UNITED STATES FIDELITY INSURANCE & GUARANTY CO v MCCA

In the first case of these consolidated appeals, Daniel Migdal was injured in a 1981 car accident in which he incurred catastrophic injuries. His injuries included a traumatic brain injury with cerebral spastic quadriplegia, severe oral motor apraxia, and dysphasia. Because of the extent of the injuries, Daniel was prescribed, and received, 24-hour-a-day nursing care. In 1988, Michael Migdal (Mr. Migdal), Daniel's father and the conservator of Daniel's estate, sued the no-fault insurance provider, United States Fidelity Insurance & Guaranty Company (USF&G), to recover expenses paid for Daniel's care. In 1990, the parties entered into a consent judgment. Pursuant to the judgment, USF&G paid Mr. Migdal $35,000 in exchange for a release from all contractual liability for nursing care provided before May 10, 1989. Additionally, USF&G agreed to pay $17.50 an hour for Daniel's home nursing care for the following year.[1] The payments would be rendered regardless of whether Daniel's parents provided the nursing care or a third party was brought in to provide the care. The hourly rate, fixed for the first year after the

[1] Mr. Migdal created a company to manage Daniel's care. This company acted as an intermediary using the benefit payments from USF&G to pay the hired nurses that cared for Daniel and to pay Mr. Migdal for his efforts in Daniel's care. The judgment contained the caveat that if Daniel's condition substantially changed, the court retained jurisdiction and could determine whether a reduction or increase in the payments was "warranted."

judgment, was subject to an annual increase of 8.5%. The increased rate would be compounded based on the previous year's rate.

Pursuant to the consent judgment, USF&G paid Mr. Migdal the consented-to hourly wage.[2] Once the amount paid to Mr. Migdal had reached the statutory threshold amount of $250,000,[3] the MCCA began to reimburse USF&G for payments made to Mr. Migdal that exceeded the threshold. However, the MCCA ultimately refused to reimburse USF&G for the amount over $250,000 that USF&G paid Mr. Migdal under the consent judgment. In 2003, USF&G filed a complaint in the Oakland Circuit Court for a declaratory judgment that the MCCA must reimburse USF&G for the total amount that USF&G paid to Mr. Migdal under the consent judgment, regardless of the reasonableness of the amount. At the time, USF&G was paying $54.84 an hour to Mr. Migdal for Daniel's nursing care.[4] The MCCA sought to only be required to reimburse USF&G at a rate of $22.05 an hour, arguing that the agreed-upon rate of $54.84 an hour was unreasonable and, therefore, the MCCA should not have to reimburse

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[2] Mr. Migdal testified that his duties included reading papers concerning business management and medical advances, checking and providing maintenance of Daniel's equipment, keeping the books, paying the nurses, and shopping for necessary items for Daniel's care.

[3] MCL 500.3104(2) reads, in pertinent part:

> [T]he association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence . . . .

At the time of both accidents involved in these consolidated appeals, the threshold amount was $250,000.

[4] Mr. Migdal paid $32 an hour of this amount to the nurses (including benefits), and Mr. Migdal kept the rest as compensation for his work.

USF&G for the total amount. Meanwhile, USF&G sought to have the consent judgment with Mr. Migdal revised, arguing that circumstances changed when Mr. Migdal hired a third party to care for Daniel instead of providing the nursing care himself. Mr. Migdal filed a motion for summary disposition for failure to state a claim. The court granted Mr. Migdal's motion.[5]

Likewise, the MCCA made a motion for summary disposition. It contended that there was no question of material fact that the payments made by USF&G to Mr. Migdal were unreasonable. Moreover, the MCCA argued that the no-fault act only required reimbursement of payments that are reasonable. In a countermotion for summary disposition, USF&G argued that the no-fault act required the MCCA to reimburse it for the full amount paid to Mr. Migdal, despite any unreasonableness regarding the amount paid. Alternatively, USF&G argued that there was a question of material fact concerning the "unreasonableness" of the consent judgment.

The trial court granted USF&G's motion for summary disposition, ruling that the MCCA must reimburse USF&G for its "ultimate loss,"[6] which included the entire amount that USF&G had to pay Mr. Migdal regardless of whether the amount paid was reasonable. The trial court denied the MCCA's motion for summary disposition. The trial court entered a judgment requiring the MCCA to reimburse USF&G in the amount of $1,725,072 under the no-fault act and holding the MCCA liable for future payments consistent with the

[5] USF&G did not appeal this decision. I therefore express no opinion on whether the consent judgment would have been subject to judicial modification on the ground that the payment amount it called for had become unreasonable with the passage of time.

[6] MCL 500.3104(2).

consent judgment. The parties agreed to stay the enforcement of the order while the MCCA appealed by right in the Court of Appeals.

HARTFORD INS CO v MCCA

In the second case of these consolidated appeals, Robert Allen was injured in a 2001 car accident in which he incurred catastrophic injuries. His injuries included right-sided pleuritic effusion, brain injuries, quadriparesis, bilateral frozen shoulder, and cardiopathy. Because of the extent of the injuries, Allen was prescribed, and received, 24-hour-a-day care by a licensed nurse. Hartford Insurance Company of the Midwest (Hartford), Allen's no-fault insurer, initially paid $20 an hour for the nurse. In 2003, Hartford agreed to pay an increased rate of $30 an hour for Allen's care. Soon thereafter, Hartford's payments for Allen's care exceeded the $250,000 statutory threshold.

The MCCA refused to reimburse Hartford for any payments above $20 an hour for the services rendered. Hartford filed a complaint for a declaratory judgment that would require the MCCA to pay Hartford $571,847.21 as reimbursement for payments exceeding the no-fault threshold. Additionally, Hartford sought a declaration that the MCCA must reimburse Hartford for the total payments above the $250,000 threshold, regardless of the reasonableness of the payments. After the initial filing, Hartford moved for summary disposition, arguing that the no-fault act required the MCCA to reimburse Hartford for the entire amount paid to Allen that exceeded the threshold, regardless of the reasonableness of that amount. The MCCA argued that it only had to reimburse Hartford for reasonable payments and that there was insufficient discovery concerning the reasonableness of the amount of the pay-

ments. The circuit court judge ruled that reasonableness was an element in determining how much the MCCA must reimburse Hartford and that there was insufficient discovery to determine whether the payments were reasonable. Hartford immediately appealed the trial court's holding requiring the element of reasonableness to be considered.

THE COURT OF APPEALS DECISION

The Court of Appeals consolidated the USF&G and Hartford cases and held that "*MCL 500.3104* does not incorporate a 'reasonableness' requirement and requires the MCCA to reimburse insurers for the *actual* amount of PIP benefits paid in excess of the statutory threshold."[7] (Emphasis in the original). The MCCA sought leave to appeal in this Court, and this Court granted leave.[8]

II. STANDARD OF REVIEW

Statutory interpretation is a question of law, which this Court reviews de novo. *In re Investigation of March 1999 Riots in East Lansing (People v Pastor)*, 463 Mich 378, 383; 617 NW2d 310 (2000). This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Herald Co v Bay City,* 463 Mich 111, 117; 614 NW2d 873 (2000).

III. ANALYSIS

The issue before this Court involves how much of a member insurer's coverages the MCCA must indemnify in the event of a catastrophic injury. Specifically, is the

[7] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 192; 731 NW2d 481 (2007).

[8] 481 Mich 862 (2008).

MCCA liable for reimbursement of PIP payments based on potentially unreasonable claims?

The outcome of these cases depends on this Court's interpretation of the language in MCL 500.3104. An overarching rule of statutory construction is "that this Court must enforce clear and unambiguous statutory provisions as written." *In re Certified Question Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n*, 433 Mich 710, 721; 449 NW2d 660 (1989) (quotations omitted). "If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, "what is 'plain and unambiguous' often depends on one's frame of reference." *Shiffer v Gibraltar School Dist Bd of Ed*, 393 Mich 190, 194; 224 NW2d 255 (1974). In order to ascertain this frame of reference, the contested provisions must be read in relation to the statute as a whole and work in mutual agreement. *In re Certified Question*, 433 Mich at 722. See also *State Treasurer v Wilson*, 423 Mich 138, 144; 377 NW2d 703 (1985).

Additionally, the frame of reference shares a deep nexus with the intent of the Legislature. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004), quoting *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Fundamentally, "[t]his task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of [the Legislature's] intent . . . ." *Sun Valley*, 460 Mich at 236 (citation and quotation marks omitted). This Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and

purpose in the statutory scheme.' " *Id*. at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley*, 460 Mich at 237.

In interpreting § 3104, this Court first must determine how § 3104(2) corresponds with § 3107 and how these two provisions correspond within the scheme of the entire statute. Section 3104(2) requires that the MCCA "shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence . . . . "[9] Section 3107(1)(a) defines "personal protection insurance *benefits*" as "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation." This provision requires that all PIP benefits claimed and paid between the insurer and the insured must be reasonable. The MCCA argues that this Court should incorporate the § 3107 definition of "benefits" into § 3104(2) where § 3104(2) refers to "coverages." However, I would decline to do so because the phrase "personal protection insurance *benefits*" has a distinct meaning from the phrase "personal protection insurance *coverages*" that is found in § 3104(2).

When the Legislature uses different words, the words are generally intended to connote different meanings.

[9] The amounts are statutorily set to increase over time. At the time of both accidents, the threshold amount was $250,000. In 2008, the threshold amount was $440,000. See MCL 500.3104(2)(a)-(k).

Simply put, "the use of different terms within similar statutes generally implies that different meanings were intended." 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 46:6, p 252. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word. This construction rule is the corollary to the rule that "words used in one place in a statute have the same meaning in every other place in the statute." *Little Caesar Enterprises v Dep't of Treasury*, 226 Mich App 624, 630; 575 NW2d 562 (1997). Therefore, I disagree with the MCCA and would hold that the definition of personal protection insurance *benefits* found in § 3107(1)(a) (including the reasonableness standard) is not equivalent to the definition of personal protection insurance *coverages* in § 3104(2).

The distinctive use of the term "coverages" is important. *LeBlanc v State Farm Mut Auto Ins Co*, 410 Mich 173, 204; 301 NW2d 775 (1981) (" 'Coverage', a word of precise meaning in the insurance industry, refers to protection afforded by an insurance policy, or the sum of the risks assumed by a policy of insurance."). Although the terms "benefits" and "coverages" are related because of their close proximity in the statute,[10] the proximity of these two terms does not mean that they are synonymous.

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[10] MCL 500.3107(1) provides, in pertinent part:

> Except as provided in subsection (2), personal protection insurance *benefits* are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance *coverage* shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations . . . or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00. (Emphasis added.)

Section 3107 excludes from the definition of "allowable expenses" within PIP "coverages" hospital charges in excess of reasonable and customary semi-private room charges and funeral and burial expenses in amounts specified in the policy (subject to a range specified in that section). This leaves all other charges open to PIP "coverage." The fact that the Legislature limited the exceptions to "coverage" so narrowly indicates that the term "coverage" is a broader term than "benefits." Moreover, since "coverages" is never given a more restrictive definition elsewhere in the statute, the word must be afforded its ordinary everyday meaning. *Sun Valley*, 460 Mich at 237 ("The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended."). In the grammatical context, the meaning of "coverages" is its common meaning, limited only by the specific statutory exceptions.

"Coverage" is defined in dictionaries as the "[e]xtent of protection afforded by an insurance policy [or the] amount of funds reserved to meet liabilities,"[11] as "protection against a risk or risks specified in an insurance policy,"[12] as "the risks within the scope of an insurance policy,"[13] and as the "amount and extent of risk covered by insurer."[14] Under the common meaning of "coverage," the contractual liability amount that an insurer agrees to pay an insured is considered a part of the insurer's coverage.[15] USF&G and Hartford paid

[11] *Webster's II New College Dictionary* (1995).

[12] *Random House Webster's Dictionary* (2001).

[13] Black's Law Dictionary (7th ed).

[14] Black's Law Dictionary (5th ed).

[15] I agree with the majority insofar as it concludes that the MCCA was required to indemnify the insurer for (1) the ultimate loss; (2) sustained under personal protection insurance coverages; and (3) in excess of the

funds pursuant to a consent judgment and a settlement

statutory threshold. However, the majority erroneously limits the term "coverages" by incorporating into its definition the reasonableness requirement for "benefits" found in § 3107. However, as the various definitions of "coverage" reveal, "coverages" is not such a specific term that it can be limited to the amount of "benefits" payable under a policy. Rather, "coverages" is a broad term that applies to different categories of risks. Hence, the Legislature used "benefits" and "coverages" as distinct terms with distinct meanings. By incorporating the reasonableness requirement of "benefits" into "coverages," the majority blurs the meaning of the terms and ignores the broad common meaning of "coverages."

The majority opinion relies significantly on language from *In re Certified Question* that limits the indemnification requirement of § 3104(2) to "a policy which was written in this state to provide the compulsory security requirements of § 3101(1) of the no-fault act for the 'owner or registrant of a motor vehicle required to be registered in this state.' " *In re Certified Question*, 433 Mich at 723. The majority seizes on this language as "implicitly" holding that the MCCA may review claims to determine whether members are entitled to indemnification.

The majority's reliance on *In re Certified Question* in this case is flawed. First, it notes that the *In re Certified Question* Court allowed the MCCA to determine whether the insured was a "resident" of the state. Once the residency question was resolved, the Court determined that the MCCA was not required to indemnify the insurer because § 3104(2) does not apply to PIP payments to nonresidents. Therefore, the benefits at issue in *In re Certified Question* were paid pursuant to the requirements of § 3163 of the no-fault act, not § 3101. By contrast, the policies at issue here clearly were written to provide the security required by § 3101. *In re Certified Question* at most only gave the MCCA the authority to reject indemnification for benefits paid to nonresidents under § 3163. Thus, to the extent that the majority opinion relies on *In re Certified Question* as determinative here, it errs. The majority goes too far by endorsing an extension of the holding of *In re Certified Question* to allow the MCCA to resolve *any* question about whether § 3104(2) applies.

Further, in *In re Certified Question*, once the residency question was answered, it was objectively clear from the statutory language that § 3104(2) did not apply. In contrast, in this case the majority extends the reasoning of *In re Certified Question* to allow the MCCA to make subjective "reasonableness" determinations about the insurer's payment of PIP benefits. Yet nothing in the statutory scheme explicitly gives the MCCA the authority to make such a determination. The majority claims that "[c]oncomitant with the absence of an obligation to indemnify is the authority to act accordingly and reject claims that do not meet the

agreement with the respective insureds. This contractual liability, or coverage, owed by each insurer is the total amount agreed to between the original contracting parties. The reasonableness of the agreed payment amount is not a factor.

The meaning of "coverages" in MCL 500.3107 becomes clearer after considering " 'its placement and purpose in the statutory scheme.' " *Sun Valley*, 460 Mich at 236, quoting *Bailey*, 516 US at 145. In the statute, "coverages" is positioned just after "ultimate loss." "Ultimate loss" is statutorily defined as the "actual loss amounts that a member is *obligated* to pay and that are paid or payable by the member . . . ." MCL § 3104(25)(c) (emphasis added). The obligation of the insurer is to fulfill its duty by honoring its contractual coverages. The duty to perform the contract relates back to the ultimate loss insofar as the ultimate loss includes payment of the obligation, i.e., the total contracted amount. Consequently, the MCCA must reimburse the insurers for 100 percent of the ultimate loss, which reflects the amount agreed between the insurer and the insured, and subject to PIP coverage. The ultimate loss specifically refers to coverage, which is broader than benefits and is not statutorily limited to reasonable payments.[16]

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requirements of § 3104(2)." *Ante* at 427. I disagree. Again, *In re Certified Question* only relieved the MCCA of its obligation to indemnify benefits paid under § 3163. *In re Certified Question* did not, explicitly or implicitly, grant the MCCA additional authority beyond the authority granted to it by the plain language of the statute.

[16] The MCCA argues that if there is not a reasonableness factor for them to enforce, then the member insurers will have no incentive to make reasonable settlement deals that do not exceed the statutory threshold amount because the insurers will not be liable to pay anything beyond the threshold amount. However, one incentive comes from higher premiums paid to the MCCA. See MCL 500.3104(7)(d) (requiring that the

Moreover, the MCCA is not a no-fault insurer of its member companies and the member companies are not injured persons entitled to no-fault indemnification. Thus, the relationship between the MCCA and its members is not subject to the reasonableness requirements found in MCL 500.3107. Rather, the Legislature provided in § 3104(2) that the MCCA would "indemnify" the insuring members for PIP payments. The Legislature did not state that the MCCA would "insure" or "reinsure" the members for amounts greater than the threshold. Black's Law Dictionary (5th ed) defines "indemnify" as "[t]o restore the victim of a loss, in whole or in part, by payment . . . ; to secure against loss or damage . . . ." Indemnification is not a contingent plan like an insurance plan. Instead, it is a set security meant to assist against certain circumstances. Here, those circumstances arise when the PIP amount contracted by the insurer exceeds the statutory threshold.

Section 3401(1) states that the MCCA is "not subject to any laws . . . with respect to insurers." Thus, the MCCA is not a no-fault insurance agency, and consequently it is not a reinsurance agency either. Because the MCCA is not a no-fault insurer, but, rather, an indemnitor of no-fault insurers for benefits in excess of the statutory threshold, § 3107 does not directly bind the MCCA; it only binds the insurance members and the insured. Section 3107 "makes both reasonableness and necessity explicit and necessary elements of a *claimant's* [insured's] recovery . . . ." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990) (emphasis added). Specifically, it is the insurance company that has the right to deny a claim (or part of a

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MCCA assess its member companies an annual premium on each of their no-fault policies written in Michigan). If all the individual members act in a manner that does not regard the reasonableness of their settlements, then insurance premiums will increase greatly.

claim) for unreasonableness under § 3107. The *insured* then has the burden to prove that the charges are in fact reasonable. See generally *Nasser*, 435 Mich 33, *Manley v Detroit Automobile Inter-Ins Exch*, 425 Mich 140; 388 NW2d 216 (1986), and *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577; 543 NW2d 42 (1995). Given that the established burden of proof is on the insured, it is counterintuitive to conclude that the member insurance company would benefit from not having the burden of proof in one instance against an insured, but having the burden in another instance against the MCCA.

The MCCA maintains that the foregoing statutory constructions will lead to higher costs to the insured and will be a disincentive for member insurers to keep payments reasonable. These fears are unfounded. The MCCA is an unincorporated nonprofit association, whose purpose is to provide insurers with indemnification for PIP policies that exceed a certain threshold. See MCL 500.3104(1). The Legislature created the MCCA "in response to concerns that Michigan's no-fault law provision for unlimited [PIP] benefits placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims." *In re Certified Question*, 433 Mich at 714. The MCCA maintains that it should have the ability to unilaterally stop making indemnification payments to a member when it determines that the claim payments are unreasonable. Yet, the MCCA acknowledges that a member can take the MCCA to court over a reasonableness dispute, which would leave a finder of fact as the ultimate authority over whether the payments are reasonable.[17]

[17] Presumably, under the statute, the costs of this trial would be covered or charged to the member insurer. See MCL 500.3104(7)(g) (the MCCA "may charge the cost of adjustment to the member" that the

In essence, under the MCCA's preferred outcome, when a member insurer makes an agreement with an insured (often in a court setting, whether it be an arbitration hearing, consent judgment, or declaratory judgment), the member must then sue the MCCA if the MCCA finds that the payment is unreasonable. If this Court were to accept the MCCA's argument, the logical consequence would be that member insurers would be reluctant to settle with the claimant. The member insurer could then force a jury trial with every catastrophically injured claimant under this benefit in order to secure a verdict with a "reasonable" stamp on the result. This outcome goes against the legislative purpose of assuring efficient and quick recovery for claimants in the no-fault system. *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978) ("The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.").

In response to the MCCA's concerns, it should be pointed out that the MCCA is not without a safeguard to protect against unreasonable payments. The Legislature specifically laid out powers that the MCCA could exercise to guard against the possibility that an insurer might take inadequate steps to obtain a review and reasonable settlement of catastrophic claims. MCL 500.3104(7)(b) states that the MCCA shall:

> Establish procedures by which members shall promptly report to the association each claim that, on the basis of the injuries or damages sustained, may reasonably be anticipated to involve the association if the member is ultimately held legally liable for the injuries or damages. Solely for the

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MCCA deems to have inadequate practices or procedures); MCL 500.3104(7)(b) ("Solely for the purpose of reporting claims, the member shall in all instances consider itself legally liable for the injuries or damages.").

> purpose of reporting claims, *the member shall in all instances consider itself legally liable for the injuries or damages*. The member shall also advise the association of subsequent developments likely to materially affect the interest of the association in the claim. [Emphasis added.][18]

This statutory language establishes that the MCCA must create a structure whereby members are bound and liable to the MCCA to deliver paperwork regarding potential claims that would exceed the threshold and consequently affect the MCCA. The MCCA's plan of operation likewise echoes these statutory requirements.[19] Specifically, this language requires that the MCCA's safety check over the member's claim must occur upon the member's *anticipation* that the payment will affect the MCCA, or if the agreement has already been made, when circumstances change and the member believes the payment to the insured will soon affect the MCCA.

It is *only* at these times, not after, that the MCCA can take action regarding the claim. MCL 500.3104(7)(g). Accordingly, the MCCA must respond in accordance with § 3104(7)(g). Under § 3104(7)(g), the MCCA must

> [e]stablish procedures for reviewing claims procedures and practices of members of the association. *If the claims procedures or practices of a member are considered inad-*

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[18] Section 3104 includes numerous other rules for the MCCA, such as membership requirements, liability, and creation of a "plan of operation."

[19] Art X, § 10.01 of the plan of operation provides in part:

> Members shall report to the Association such information as the Board may require on forms prescribed by the Board: (a) As soon as practicable after the loss occurrence, Members shall report each claim which, on the basis of the injuries or damages sustained, may reasonably be anticipated to result in a Reimbursable Ultimate Loss, and for purposes of reporting the Member shall consider itself legally liable for the injuries and damages.

> *equate to properly service the liabilities of the association, the association may undertake* or may contract with another person, including another member, *to adjust or assist in the adjustment of claims* for the member on claims that create a potential liability to the association and may charge the cost of the adjustment to the member. [Emphasis added.]

More clearly, when § 3104(7)(g) is read in conjunction with § 3104(7)(b), the outcome is that the MCCA is required to review those reports by members that anticipate needing indemnification and to assess the adequacy of the *procedures or practices* of the member.[20] Upon a finding of inadequacy, the MCCA can adjust the *practices or procedures* of the member.[21] One of the key protections here is that MCCA has the power and duty to adjust *only* "procedures and practices" of the member that produce an unreasonable payment amount; the

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[20] The MCCA argued that since part of § 3104(7)(g) uses the term "may" instead of "must" in describing some of its potential powers, the MCCA has greater power than what directly follows in the statute to limit or control the individual member insurers. The MCCA wishes to conclude that since the section does not set forth a duty to act in a specific way (e.g., review claims), it allows the MCCA to act how *it* wants regarding member claims, including questioning their reasonableness. This is erroneous. The starting general presumption and purpose of the MCCA is to indemnify insurers for payments beyond the threshold amount, so that smaller insurance firms can continue to exist in the no-fault world of Michigan.

[21] The plan of operation also echoes the statute in this regard:

> If a Member or 3103 Member refuses to timely submit the reports or information required of it pursuant to Section 10.01 or otherwise, or if the Board should determine that the reports and information submitted by a Member or 3103 Member are unreliable or incomplete, the Board may, at the member's expense, direct that an authorized representative of the Association (which may be another member) shall audit and inspect such member's records and compile the required information and data. [Art X, § 10.02.]

power does not include the power to adjust the amount.[22] The MCCA has the power to adjust situations that it anticipates will compromise its indemnification or will require it to pay unreasonable claims only if it can find fault with the member's methods or calculation of charges. Furthermore, the MCCA has the power, in adjusting the procedures and practices of member insurers, to require member insurers to inform the MCCA of any claim that could foreseeably exceed the statutory threshold and to afford the MCCA the opportunity to object to proposed settlement agreements regarding those claims. By requiring submission of proposed settlement agreements for the MCCA approval, the MCCA could protect against having to later pay unreasonable claims from member insurers. The exercise of these powers is the MCCA's safeguard from a member's neglect of its duties.

Finally, the MCCA argues that § 3104(8)(g) gives it the power to question reasonableness regardless of the statute's other provisions. Specifically, § 3104(8)(g) allows the MCCA to "[p]erform other acts not specifically enumerated in this section that are necessary or proper

[22] Although § 3104(7)(g) states that the MCCA may "adjust or assist in the adjustment of claims," the practical effect of § 3104(7)(g) is that only the MCCA is able to adjust a member insurer's procedures and practices with regard to the reasonableness of the amounts paid to insureds. When the MCCA asserts its power to adjust or assist in the adjustment of a claim, the MCCA effectively steps into the shoes of the member insurer. The claim that the MCCA reviews for adjustment purposes is the claim made by the insured to the member insurer, not the reimbursement claim made by the member insurer to the MCCA. Thus, the MCCA, standing in the shoes of the member insurer, is limited to the member insurer's power to review the insured's claim for reasonableness as spelled out in the member insurer's policy, a settlement agreement, or a consent judgment. With regard to the reasonableness of the amount paid to the insured, the amount is still dictated by the amount that the member insurer is "obligated" to pay to the insured.

to accomplish the purposes of the association and that are not inconsistent with this section or the plan of operation." However, this section does not give the MCCA *carte blanche* to simply avoid whichever member insurer's agreement that it finds unreasonable. The power granted under § 3104(8)(g) is limited to accomplishing the "purposes of the association." More importantly, the exercise of this power cannot be "inconsistent with this section or the plan of operation." *Id*. The plan of operation, created by § 3104(17), must be "*consistent* with the objectives and provisions of this section, which shall provide for the economical, fair, and nondiscriminatory administration of the association *and for the prompt and efficient provision of indemnity.*" MCL 500.3104(17) (emphasis added).

Section 3104(8)(g) allows the MCCA to fulfill the specific requirements of the statute. Accordingly, I would interpret § 3104(8)(g) as granting the MCCA the limited power to further its purpose of prompt and efficient indemnification to its members. To interpret that section as granting any further power, such as the power to decline indemnification on the basis of the reasonableness of the indemnification amount, would be inconsistent with the intention of the Legislature.

IV. CONCLUSION

I would hold that the indemnification obligation set forth in § 3104(2) does not incorporate the reasonableness standard that § 3107 requires between claimants and member insurers. Furthermore, the powers granted to the MCCA in § 3104(7) are limited to adjusting the "practices and procedures" of the member insurers and do not encompass adjustment to the payment amount agreed to between claimants and member insurers.

Finally, I would hold that the power granted to the MCCA under § 3104(8)(g) is limited to furthering the purposes of the MCCA, and that determining reasonableness is not one of its purposes.

Accordingly, I dissent and would affirm the Court of Appeals holding that the MCCA must reimburse its member insurers 100 percent of the ultimate loss exceeding the statutory threshold for claims regardless of the reasonableness of the amount.

CAVANAGH and KELLY, JJ., concurred with WEAVER, J.

ODOM v WAYNE COUNTY

Docket No. 133433. Argued October 1, 2008 (Calendar No. 4). Decided December 30, 2008.

Amanda J. Odom brought an action in the Wayne Circuit Court against Wayne County, Christine Kelly, and the city of Detroit after Kelly, a Wayne County sheriff's deputy, cited Odom for a prostitution-related offense and the prosecution dismissed the charges. Odom alleged false imprisonment and malicious prosecution. The city was dismissed from the lawsuit. Kelly and the county asserted affirmative defenses of governmental immunity and subsequently moved for summary disposition on that ground. The court, William J. Giovan, J., granted the county summary disposition, but denied the motion with respect to Kelly. Despite the allegations of intentional torts, the trial court concluded that Odom was proceeding under a theory of gross negligence and found that a factual question remained concerning probable cause for Odom's arrest. The Court of Appeals, FORT HOOD, P.J., and TALBOT and SERVITTO, JJ., affirmed on other grounds in an unpublished opinion per curiam issued February 1, 2007 (Docket No. 270501), holding that, for Kelly to be protected by governmental immunity, her intentional acts had to be justified or objectively reasonable under the circumstances, rather than not grossly negligent. The Supreme Court initially denied Kelly's application for leave to appeal, 480 Mich 1015 (2008), but granted the application on reconsideration, 480 Mich 1184 (2008).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, and MARKMAN, the Supreme Court *held*:

The grant of governmental immunity in MCL 691.1407(2) is limited to negligent torts. MCL 691.1407(3) preserves the law of intentional torts as it existed before July 7, 1986, including the grant of governmental immunity from intentional-tort liability. Thus, under the test of *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984), governmental employees enjoy qualified immunity for intentional torts. A governmental employee must raise governmental immunity as an affirmative defense and establish (1) that the employee undertook the challenged acts during the course of employment and that the employee was acting, or

reasonably believed that he or she was acting, within the scope of his or her employment, (2) that the employee undertook the acts in good faith, or did not undertake them with malice, and (3) that the acts were discretionary, rather than ministerial, in nature. Because the trial court erroneously determined that Odom's claims sounded in gross negligence and used the wrong legal standard, it failed to address these questions, finding only that a factual question remained concerning the existence of probable cause. The Court of Appeals also failed to conduct the proper inquiry under *Ross*, focusing instead on whether Kelly's conduct was justified or objectively reasonable. On remand, the trial court must reconsider Kelly's motion for summary disposition in light of the *Ross* test and determine if Kelly adequately supported her claim of governmental immunity given Odom's allegations of intentional torts.

Trial court order vacated with respect to Kelly, Court of Appeals judgment vacated, and case remanded to trial court for further proceedings.

CAVANAGH and KELLY, JJ., concurred in the result only.

GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — TORTS — INTENTIONAL TORTS.

A governmental employee enjoys qualified immunity from liability for intentional torts; the governmental employee must raise governmental immunity as an affirmative defense and establish (1) that the employee undertook the challenged acts during the course of employment and that the employee was acting, or reasonably believed that he or she was acting, within the scope of his or her employment, (2) that the employee undertook the acts in good faith, or did not undertake them with malice, and (3) that the acts were discretionary, rather than ministerial, in nature (MCL 691.1407[3]).

Sakis & Sakis, P.L.C. (by *Jason R. Sakis* and *Raymond S. Sakis*), for Amanda J. Odom.

Zausmer, Kaufman, August, Caldwell & Tayler, P.C. (by *Mark J. Zausmer* and *Carson J. Tucker*), for Christine Kelly.

Amici Curiae:

Kym L. Worthy, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the Wayne County Prosecutor's Office.

John A. Lyons for the Michigan Association of Police Organizations.

Cummings, McClorey, Davis & Acho, P.L.C. (by *Karen M. Daley* and *T. Joseph Seward*), for the Michigan Municipal Risk Management Authority.

Plunkett Cooney (by *Mary Massaron Ross*) for the Michigan Municipal League Liability and Property Pool and the Michigan Municipal League.

Michael A. Cox, Attorney General, and *B. Eric Restuccia*, Solicitor General, for the Attorney General.

YOUNG, J. In this case, we are asked to determine when a governmental employee is immune from liability for an intentional tort. We hold that MCL 691.1407(3) of the governmental tort liability act (GTLA), which explicitly maintains "the law of intentional torts as it existed before July 7, 1986," grants immunity to governmental employees from intentional-tort liability to the extent allowed by the common law before July 7, 1986. We therefore reaffirm and apply the test concerning intentional-tort immunity outlined in *Ross v Consumers Power Co (On Rehearing)*.[1] Under the *Ross* test, governmental employees enjoy qualified immunity for intentional torts. A governmental employee must raise governmental immunity as an affirmative defense and establish that (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature. Neither the trial court nor the

[1] 420 Mich 567; 363 NW2d 641 (1984).

Court of Appeals considered whether the governmental employee was entitled to governmental immunity under the test provided in *Ross*. Accordingly, we vacate the trial court's order with respect to defendant, vacate the judgment of the Court of Appeals and remand to the trial court to apply the proper test.

I. FACTS AND PROCEDURAL HISTORY

Wayne County Sheriff's Deputy Christine Kelly (defendant) investigated prostitution and controlled substances offenses in the department's "morality unit." At the time of the incident giving rise to the present case, she had 10 years' experience and had made more than 500 prostitution-related arrests. On February 11, 2004, she was conducting surveillance near the intersection of Woodward Avenue and Burlingame Street in the city of Detroit. Defendant claimed that plaintiff, Amanda Jean Odom, walked back and forth along Woodward while making eye contact with the drivers of cars passing by, a method used by prostitutes to attract the attention of potential customers. She observed plaintiff approach the driver's side window of a car parked in a liquor store parking lot and then enter the back seat. The car drove to a nearby grocery store; plaintiff went inside for approximately five minutes and returned to the car,[2] which then drove away.

After contacting her supervisor and calling for backup, defendant followed the car down Woodward Avenue and into a residential area. Detroit police officers stopped the car at a point that, as it turned out, was only two blocks from plaintiff's home. The officers drew their guns and ordered plaintiff and the two female

[2] Defendant asserted that it is not uncommon for a prostitute to go into a store for a short time to purchase alcohol or condoms and return to the customer's car.

passengers out of the vehicle.[3] The women were all handcuffed and questioned.[4]

Upon being stopped, plaintiff asserted her innocence. She explained that her friend had driven her home from her place of employment and showed that she was still wearing her work identification badge. She further explained that her friend had dropped her off at a bank and driven around the block. However, plaintiff explained that she could not enter the bank because the police were apparently stopping a robbery in progress. She looked north and south before sighting her friend's car in a nearby parking lot. Plaintiff walked to the car, entered the back seat, and was driven to a grocery store, where she used the ATM and purchased some groceries.

After relating her version of events to the officers, plaintiff overheard one officer tell defendant, "Well it's your call." Defendant issued plaintiff a criminal citation for "Disorderly Conduct (Flagging) Impeding the Flow of Vehicular and Pedestrian Traffic"—an offense frequently associated with prostitution. Plaintiff claims that, when she objected to the citation, defendant became angry and told her to "fight it."

Plaintiff was ordered to appear for arraignment one week later. When she appeared, however, the district court had no record of the citation. Plaintiff contacted both the Detroit Police Department and the Wayne County Sheriff's Department to determine the status of the charges against her. Upon learning that the record

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[3] There was also a three-year-old child in the car.

[4] Defendant claimed that her suspicions of plaintiff were not alleviated by the fact that the vehicle's occupants were all female. Defendant testified in her deposition that prostitutes often work in teams from a car and drive each other to and from "work." Defendant also explained that females may solicit a prostitute to purchase controlled substances on their behalf.

of plaintiff's citation had been lost, defendant issued a new citation and had the charges reinstated. When plaintiff appeared for arraignment a second time in June 2004, the court required her to attend an AIDS awareness class for sex offenders. The case was postponed several times between June and December 2004. The prosecution finally dismissed the charges on December 6, 2004, because of insufficient evidence. The dismissal order indicated that the parties stipulated to the existence of probable cause. Neither plaintiff nor her counsel signed the dismissal form, and plaintiff denies that she made such a stipulation.

Plaintiff filed suit against defendant, Wayne County, and the city of Detroit, alleging false imprisonment and malicious prosecution. The parties stipulated to the dismissal of the city of Detroit early in the proceedings. In their answer to plaintiff's complaint, defendant and Wayne County raised "individual immunity" and "governmental immunity," respectively, as affirmative defenses. Following discovery, defendant and Wayne County also filed a joint motion for summary disposition based on governmental immunity, MCR 2.116(C)(7), and failure to create a genuine issue of material fact, MCR 2.116(C)(10).[5] The trial court granted the county summary disposition on the basis of the governmental immunity conferred by MCL 691.1407(1).[6]

The trial court denied defendant summary disposition. Although plaintiff alleged that defendant had

[5] The motion for summary disposition also refers to MCR 2.116(C)(8); however, defendant made no arguments based on that rule. Moreover, in a subsequent motion for clarification of the trial court's order, defendant asserted that she sought summary disposition under (C)(7) and (10) and did not mention (C)(8).

[6] Subsection 1 provides immunity to governmental agencies when conducting governmental functions. It is well established that "the

committed the intentional torts of false imprisonment and malicious prosecution, the trial court concluded that plaintiff was proceeding under a gross negligence theory because she had not alleged "an intentional act" such as excessive force. The trial court presumably considered whether defendant was entitled to the immunity conferred by MCL 691.1407(2); however, it did not explicitly cite the statute. The court found that there remained factual questions regarding whether defendant had probable cause to arrest and prosecute plaintiff. The trial court indicated that these factual questions prevented it from determining whether defendant was entitled to immunity as a matter of law. The court thereby treated governmental immunity as an affirmative defense that could be proved at trial.

The Court of Appeals affirmed on other grounds. The Court of Appeals panel made no mention of subsection 3, analyzing only the requirements of subsection 2.[7] The panel held that plaintiff had indeed alleged intentional torts. Therefore, to be protected by governmental immunity, the challenged acts undertaken by defendant had to be "justified" or "objectively reasonable under the circumstances," rather than not grossly negligent.[8] The panel held that, given the conflicting evidence, whether defendant's conduct was justified could not be decided as a matter of law.[9]

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management, operation, and control of a police department is a governmental function." *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002).

[7] *Odom v Wayne Co*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2007 (Docket No. 270501), p 2.

[8] *Id.* at 2-3, citing *VanVorous v Burmeister*, 262 Mich App 467, 480; 687 NW2d 132 (2004), *Sudul v Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997), and *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984).

[9] *Odom*, unpublished opinion per curiam at 3.

Initially, this Court denied defendant's application for leave to appeal.[10] However, upon reconsideration, we determined that this area of the law had fallen into disarray and required clarification. We granted defendant's application for leave to appeal and directed the parties to address the following issues:

> (1) what is the proper interpretation of MCL 691.1407(3) ("[MCL 691.1407(2)] does not alter the law of intentional torts as it existed before July 7, 1986."); (2) can intentional torts claims be brought under MCL 691.1407(2); and (3) for an intentional tort claim, what must a plaintiff plead to avoid governmental immunity?[11]

II. STANDARD OF REVIEW

We review de novo a trial court's determination regarding a motion for summary disposition. Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are " 'barred because of immunity granted by law . . . .' "[12] The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with "affidavits, depositions, admissions, or other documentary evidence," the substance of which would be admissible at trial.[13] "The contents of the complaint are accepted as true unless contradicted" by the evidence provided.[14]

In relation to a motion under MCR 2.116(C)(10), we similarly review "the pleadings, admissions, and other evidence submitted by the parties in the light most

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[10] *Odom v Wayne Co*, 480 Mich 1015 (2008).

[11] *Odom v Wayne Co*, 480 Mich 1184 (2008).

[12] *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998) (citation omitted).

[13] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); see also MCR 2.116(G).

[14] *Maiden*, 461 Mich at 119.

favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."[15]

This decision also requires us to interpret the provisions of § 7 of the GTLA, MCL 691.1407. We review de novo questions of statutory interpretation.[16] The primary goal of statutory interpretation is to discern the intent of the Legislature.[17] "To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted."[18]

III. ANALYSIS

A. HISTORY OF THE GOVERNMENTAL TORT LIABILITY ACT

Historically, governmental immunity was a common-law doctrine. In 1961, however, this Court abolished common-law governmental immunity in *Williams v Detroit*.[19] Although the Court almost immediately thereafter limited *Williams* and held that governmental immunity was abolished only in relation to municipalities,[20] the Legislature reacted by enacting the first version of the GTLA in 1965. The statute restored governmental immunity for municipalities and provided "uniform treatment for state and local agen-

[15] *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

[16] *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

[17] *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

[18] *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007).

[19] 364 Mich 231; 111 NW2d 1 (1961).

[20] *McDowell v State Hwy Comm'r*, 365 Mich 268; 112 NW2d 491 (1961).

cies."[21] The statute did *not* address immunity for governmental officers or employees. Thus, governmental immunity for individuals continued to be completely "a creature of judicial decision-making."[22]

In 1984, *Ross v Consumers Power Co (On Rehearing)* comprehensively described the common-law test for individual governmental immunity from *all* tort liability. In *Ross*, judges, legislators, and the highest executive officials at all levels of government were given immunity from all tort liability when acting within the scope of their judicial, legislative, or executive authority.[23] Lower-level governmental officials and employees were afforded qualified immunity from all tort liability if they met all the following conditions: (1) the acts were taken during the course of employment and the employees were acting, or reasonably believed that they were acting, within the scope of their authority, (2) the acts were taken in good faith, and (3) the acts were discretionary-decisional, as opposed to ministerial-operational.[24]

The Legislature amended the GTLA in 1986 in response to *Ross*. Section 7 of the GTLA now confers qualified immunity to individual governmental actors as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to

[21] *Ross*, 420 Mich at 606.

[22] *Id.* at 629.

[23] *Id.* at 633.

[24] *Id.* at 633-634.

a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

* * *

(5) A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

* * *

(7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.[25]

B. INTERPRETATION OF SUBSECTIONS 2 AND 3

The Legislature codified *Ross*'s grant of absolute immunity to high-ranking officials in MCL 691.1407(5). In MCL 691.1407(2), the Legislature granted immunity to individual governmental actors "from tort liability"

[25] MCL 691.1407.

for injuries or damage caused by the employee. The Legislature eliminated the *Ross* distinction between discretionary and ministerial acts and granted qualified immunity for both types of actions. Subsection 2 gives immunity for acts taken "while in the course of employment or service" if (a) the employee "is acting or reasonably believes he or she is acting within the scope of his or her authority," (b) the agency that the employee serves "is engaged in the exercise or discharge of a governmental function," and (c) the employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Accordingly, the Legislature replaced the *Ross* "good faith" element with a gross-negligence standard.

Subsection 2 purports to apply simply to "tort liability," and, ironically, even though that subsection concerns only gross negligence, defendant argued for the first time at oral argument before this Court that the broad tort reference includes intentional torts. However, when read in context with subsection 3, it is clear that subsection 2 encompasses only *negligent* tort liability. In subsection 3, the Legislature unambiguously expressed its intent to maintain "the law of *intentional* torts as it existed before July 7, 1986."[26]

Every provision of § 7 specifically and expressly prescribes the immunity from tort liability extended to governmental agencies and actors. In contrast, but not inconsistent with these provisions, subsection 3 indicates the Legislature's intent to *confer immunity* on governmental employees for intentional torts to the same extent allowed under the common law as it existed before July 7, 1986. Thus, the Legislature thereby removed immunity for intentional tort liability from the statutory grant of immunity in subsection 2.

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[26] MCL 691.1407(3) (emphasis added).

As will be discussed in more detail later, subsection 2 does alter the law of governmental immunity as it existed before the amendment of § 7 for *negligent* torts committed by lower-level government employees. Subsection 3 represents a deviation from the legislatively created governmental immunity scheme, but the deviation is limited to *intentional* torts. "[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls."[27] Because subsection 3 more specifically addresses "intentional torts" and subsection 2 more broadly addresses "tort liability," subsection 3 must control in this case.

We reject defendant's interpretation of subsection 3 as merely reiterating that a governmental employee who does not satisfy the requirements of subsection 2 remains liable for an intentional tort. This interpretation is contrary to the rules of statutory construction in that it would render subsection 3 surplusage.[28] A "reiteration," by definition, creates surplus language.[29] Moreover, defendant's proposed interpretation of the statute necessarily assumes that the reference in subsection 2 to "tort liability" encompasses both intentional and negligent torts. If the Legislature had intended to reiterate that a governmental employee remains liable in tort when he fails to meet the standards of subsection 2, the language of subsection 3 would not have been specifically limited to "intentional torts."

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[27] *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006), citing *Gebhardt v O'Rourke*, 444 Mich 535, 542-453; 510 NW2d 900 (1994).

[28] *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006) ("[W]e interpret every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage.").

[29] *Random House Webster's College Dictionary* (1997) defines "reiterate" as "to say or do again or repeatedly; repeat, often excessively," and "surplusage" as "an excess of words, [especially] in pleading a case."

Furthermore, defendant's interpretation cannot be sustained. As noted, subsection 2 *alters* the common-law test for governmental immunity. If subsection 2 had altered the common law in relation to *all* torts, the express terms of subsection 3 *preserving* "the law of intentional torts as it existed before July 7, 1986," would be rendered a complete nullity. Thus, although subsection 2 abolished the *Ross* distinction between discretionary and ministerial acts and replaced the *Ross* "good faith" element with a gross-negligence standard, those alterations are limited to negligent torts because "[s]ubsection (2) does not alter the law of intentional torts . . . ."[30]

C. TEST FOR IMMUNITY OUTLINED IN *ROSS*

The seminal pre-July 7, 1986, case defining the parameters of governmental immunity for individuals from tort liability is *Ross v Consumers Power Co (On Rehearing)*. Over the years, substantial confusion has arisen regarding the proper interpretation of the *Ross* test for individual governmental immunity as it is applied to intentional torts. A number of cases have either misinterpreted or failed to mention *Ross* in holding that there is no intentional-tort exception to governmental immunity.[31] We correct today this tangle of cases arising after the enactment of the current GTLA by following the legislative direction to apply the

[30] MCL 691.1407(3).

[31] See, e.g., *Marrocco v Randlett*, 431 Mich 700, 707-708; 433 NW2d 68 (1988); *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). These cases are distinguishable from the current case because they involved high-level executive officials who were extended absolute immunity for conduct undertaken within their executive authority and governmental agencies, respectively, rather than individual governmental employees.

common law "as it existed before July 7, 1986."[32] *Ross* comprehensively stated the common-law test in Michigan for individual governmental-employee immunity before the statutory date. Contrary to defendant's position, *Ross* clearly provides governmental employees qualified immunity from intentional-tort liability at common law. We take this opportunity to reaffirm and restate the *Ross* test.[33]

Under *Ross*, to be immune from liability for intentional torts, the governmental employee must first establish that the acts were taken "during the course of . . . employment and" that the employee was "acting, or reasonably believe[d] [he was] acting, within the scope of [his] authority[.]"[34] This requirement ensures that a governmental employee will not be afforded immunity when committing ultra vires acts, as these are outside the scope of the employee's authority.[35] However, it also protects a governmental employee who reasonably believes that he was authorized to take certain actions, but later learns that he was mistaken.[36]

The governmental employee must also establish that he was acting in "good faith." *Ross* did not elaborate on this element, relying instead on Prosser on Torts and the cases cited therein.[37] Prosser noted that the "considerable majority of the state courts take the position that there is no immunity where the inferior officer

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[32] MCL 691.1407(3).

[33] Cases holding that governmental employees are protected by more or less than the qualified immunity for intentional-tort liability provided in *Ross* are overruled to the extent that such cases are inconsistent with *Ross*.

[34] *Ross,* 420 Mich at 633.

[35] *Id.* at 631.

[36] *Id.* at 633 n 41.

[37] *Id.* at 632.

does not act honestly and in good faith, but maliciously, or for an improper purpose."[38] "[O]fficial immunity should not become a cloak for malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of intentional abuse of power . . . ."[39] The cases cited by Prosser indicate that there is no immunity when the governmental employee acts *maliciously* or with a *wanton or reckless disregard of the rights of another*.[40]

This standard is also consistent with prior Michigan caselaw. In *Armstrong v Ross Twp*,[41] the Court of Appeals described good faith simply as acting without malice. In *Blackman v Cooper*,[42] the Court of Appeals held that a police officer is entitled to immunity when he is "acting in good faith with probable cause . . . even though the arrest is subsequently found to be baseless." In *Dickey v Fluhart*,[43] the Court of Appeals held that an "action may lie only if the officer has utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity."

This Court has described a lack of good faith as "malicious intent, capricious action or corrupt conduct"[44] or "willful and corrupt misconduct . . . ."[45] In *Firestone v Rice*,[46] in which the plaintiff brought an action for false imprisonment and assault and battery against a police officer for handcuffing him, the Court held:

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[38] Prosser, Torts (4th ed), § 132, p 989.

[39] *Id.*

[40] See *id.* at 987-990.

[41] 82 Mich App 77, 85-86; 266 NW2d 674 (1978).

[42] 89 Mich App 639, 643; 280 NW2d 260 (1979).

[43] 146 Mich App 268, 276; 380 NW2d 76 (1985).

[44] *Veldman v Grand Rapids*, 275 Mich 100, 113; 265 NW 790 (1936).

[45] *Amperse v Winslow*, 75 Mich 234, 245; 42 NW 823 (1889).

[46] 71 Mich 377, 384; 38 NW 885 (1888) (emphasis added).

> There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through *malice or wantonness or a reckless indifference to the common dictates of humanity*.

In addition, this Court has held that "willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does."[47] Similarly, our standard civil jury instructions define "willful misconduct" as "conduct or a failure to act that was intended to harm the plaintiff"[48] and "wanton misconduct" as "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result."[49] These instructions are consistent with the negation of the common-law definition of "good faith" and can be a useful guide for a trial court considering a defendant's motion for summary disposition based on individual governmental immunity. Thus, the proponent of individual immunity must establish that he acted without malice.

The final *Ross* element to be considered when determining whether an individual is entitled to governmental immunity is whether the challenged "act" was ministerial or discretionary in nature. As explained in *Ross*, " 'A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so

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[47] *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982).

[48] M Civ JI 14.12.

[49] M Civ JI 14.11.

which results in the injury of another.' "[50] Ministerial acts "constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice."[51] The execution of an act once a decision has been made is also ministerial in nature.[52] "Discretion," on the other hand, " 'implies the right to be wrong.' "[53] Discretionary acts "require personal deliberation, decision and judgment."[54] Although the decision need not be extraordinary, governmental immunity is not afforded for "every trivial decision" an actor may make.[55] Granting immunity to an employee engaged in discretionary acts allows the employee to resolve problems without constant fear of legal repercussions.[56]

Police officers perform many discretionary acts each day. An officer must use his judgment to determine whether there is reasonable suspicion to investigate or probable cause to arrest and to determine the amount of force necessary to effectuate an arrest. A police officer similarly conducts many ministerial acts each day, such as completing activity logs and police reports or following the procedures for booking an arrested person.

D. BURDEN OF PROOF

The parties dispute who bears the burden of proof

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[50] *Ross*, 420 Mich at 626, quoting *Wall v Trumbull*, 16 Mich 228, 235 (1867).

[51] *Ross*, 420 Mich at 634.

[52] *Id.* at 634-635.

[53] *Id.* at 628, quoting *Williams*, 364 Mich at 261 (opinion by EDWARDS, J.).

[54] *Ross,* 420 Mich at 634, citing Prosser, § 132, p 988.

[55] *Ross*, 420 Mich at 634.

[56] We again note that the elimination in MCL 691.1407(2) of the distinction between ministerial and discretionary acts does not apply to individual immunity from intentional tort liability, which is provided in subsection 3 of the statute.

with regard to governmental immunity: whether the plaintiff must plead in avoidance of immunity in the complaint or whether the defendant must raise immunity as an affirmative defense.

The doctrine of "sovereign immunity" dates back to the English common law. While England was ruled by an absolute monarch, English law settled that the king was the law and, therefore, could not violate the law. Moreover, it was deemed "a contradiction of [the king's] sovereignty to allow him to be sued as of right in his own courts."[57] Governmental immunity for individuals began as an extension of the sovereign immunity given the king. It was employed to protect from liability "the servants who were carrying out [the king's] commands."[58] However, when England began to function under a parliamentary government, English common-law immunity doctrines fundamentally changed. Although the king continued to be protected by sovereign immunity, the king's agents were held liable for their wrongs, and the wrongs of the king that were imputed to them.[59]

American courts adopted the concept of sovereign, or "governmental," immunity to protect from liability the sovereign state governments (and state agencies as integral parts of the state). A central tenet of this sovereign or governmental immunity is that the state may be held liable in a court of law only when the state has expressly permitted a suit against it.[60] Under the

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[57] Prosser, § 131, pp 970; see also 4 Restatement Torts, 2d, ch 45A, p 394.

[58] 4 Restatement, §895D, comment a, p 411.

[59] See Prosser, § 131, p 971; 4 Restatement, § 895D, comment a, pp 411-412.

[60] Prosser, § 131, pp 971, 975-976; 4 Restatement, § 895B and comment a, pp 399-401.

GTLA, the state maintains its immunity when "engaged in the exercise or discharge of a governmental function"[61] unless the plaintiff establishes the existence of a statutorily created exception to that immunity.[62]

Sovereign immunity as it applied to the king in English common law and statutorily created governmental immunity that is currently applicable to the state as a sovereign government are "characteristic[s] of government."[63] As such, this immunity protects the state not only from liability, but also from the great public expense of having to contest a trial.[64] A plaintiff

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[61] MCL 691.1407(1).

[62] The statutory exceptions to the governmental immunity provided to the state and its agencies are the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008).

[63] *Mack*, 467 Mich at 198, citing (among other cases) *Canon v Thumudo*, 430 Mich 326, 344 n 10; 422 NW2d 688 (1988), *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 261 n 35; 393 NW2d 847 (1986), *Ross*, 420 Mich at 621 n 34, and *McCann v Michigan*, 398 Mich 65; 247 NW2d 521 (1976). The only case holding otherwise was *McCummings v Hurley Med Ctr*, 433 Mich 404; 446 NW2d 114 (1989). *McCummings* was an aberration, which this Court overruled in *Mack*.

[64] *Mack*, 467 Mich at 203 n 18; *Walsh v Taylor*, 263 Mich App 618, 624; 689 NW2d 506 (2004). We note that the expense to the state government and to the public can be just as great in a suit filed against a governmental employee. MCL 691.1408(1) provides that, in a civil action against a governmental employee, the government "may pay for, engage, or furnish the services of an attorney," "may compromise, settle, and pay the claim" before trial, and "may indemnify the officer, employee, or volunteer or pay, settle, or compromise the judgment" following a trial. In light of this statute, it seems inconsistent to characterize sovereign or governmental immunity as a characteristic of government that the plaintiff must avoid in his pleading as an element of the claim and individual governmental immunity as an affirmative defense. However, the Legislature indicated that "[t]his section does not impose liability on a governmental agency," MCL 691.1408(3), thereby expressing its intent not to transform the

filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity. Placing this burden on the plaintiff relieves the government of the expense of discovery and trial in many cases.

Over time, governmental immunity for individuals evolved into an affirmative defense under the common law and thus was differentiated from the immunity given to the sovereign.[65] In the GTLA, the Legislature has not abrogated the common law by shifting the burden of proof with regard to governmental immunity for individuals. Accordingly, the burden continues to fall on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense.[66]

E. SUMMARY OF THE TEST FOR INDIVIDUAL GOVERNMENTAL IMMUNITY

To summarize and simplify the application of our decision, we provide these steps to follow when a defendant raises the affirmative defense of individual governmental immunity. The court must do the following:

(1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual

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state's debt on behalf of an employee into something that can be protected by its sovereign or governmental immunity.

[65] *Mack*, 467 Mich at 198 n 15, quoting *Canon*, 430 Mich at 344 n 10.

[66] *Mack*, 467 Mich at 198 n 15; see also MCR 2.111(F)(3)(a).

caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial.

IV. APPLICATION OF THE *ROSS* TEST TO THIS CURRENT CASE

Following the guidelines set forth in this opinion, we first note that defendant indisputably is a lower-level government employee not entitled to the absolute immunity provided by MCL 691.1407(5).

It is equally clear that plaintiff pleaded intentional, rather than negligent, torts. Plaintiff asserted claims of false imprisonment and malicious prosecution, both of which contain intent as an element.[67] Contrary to the

[67] See *Lewis v Farmer Jack Div, Inc*, 415 Mich 212; 327 NW2d 893 (1982).

trial court's opinion, a plaintiff need not plead a forceful or physical act, such as use of excessive force, but must plead only an *intentional* act.

As plaintiff pleaded the occurrence of intentional torts, the trial court was required to determine whether defendant was entitled to governmental immunity as provided by the common law before July 7, 1986. Defendant timely raised governmental immunity as an affirmative defense in her first responsive pleading, as well as raising it in her motion for summary disposition. To be entitled to governmental immunity, defendant must establish that she was acting in the course of her employment and at least reasonably believed that she was acting within the scope of her authority, that her actions were discretionary in nature, and that she acted in good faith.

Because it used the wrong legal standard, the trial court did not address these questions, finding only that there remained a question of fact whether defendant lacked probable cause to detain or arrest plaintiff. The mere existence of probable cause, however, is not the proper inquiry. A police officer would be entitled to immunity under *Ross* if he acted in good faith and honestly believed that he had probable cause to arrest, even if he later learned that he was mistaken.[68] Yet the existence of probable cause is relevant to the analysis; a claim of false arrest or false imprisonment cannot be sustained if the arrest was legal.[69]

The Court of Appeals held that there remained a question of fact whether defendant's conduct was justified and "objectively reasonable." This objective analysis is also not the proper *Ross* inquiry. The good-

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[68] See Prosser, § 132, p 989 nn 95-96, and the cases cited therein; see also *Blackman*, 89 Mich App at 643.

[69] *Lewis*, 415 Mich at 218 n 2.

faith element of the *Ross* test is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent.[70]

On remand, the trial court must reconsider defendant's motion for summary disposition in light of the *Ross* test and determine if defendant adequately supported her claim of governmental immunity.

V. CONCLUSION

The trial court erroneously determined that plaintiff's claims sounded in gross negligence and, therefore, analyzed defendant's motion for summary disposition based on governmental immunity under MCL 691.1407(2). Plaintiff pleaded claims of intentional torts, and defendant was required to establish that she was entitled to governmental immunity pursuant to *Ross*, as required by MCL 691.1407(3). The trial court's analysis was erroneous because it focused solely on the potential lack of probable cause to arrest and detain plaintiff, contrary to the requirements of *Ross*. The Court of Appeals recognized that plaintiff's claims sounded in intentional tort, but analyzed defendant's right to immunity under subsection 2, which applies only to negligent torts. On remand, the trial court must determine whether defendant had a good-faith belief that she possessed probable cause to detain plaintiff before ruling on defendant's motion for summary disposition based on governmental immunity.

Because of the errors committed below, we vacate the trial court's order with respect to defendant, vacate the judgment of the Court of Appeals and remand this case

[70] See Prosser, § 132, p 989.

to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

TAYLOR, C.J., and WEAVER, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

CAVANAGH and KELLY, JJ. We concur in the result only.

TOMECEK v BAVAS

Docket No. 134665. Argued October 2, 2008 (Calendar No. 6). Decided December 30, 2008.

Frank J. Tomecek, Jr., and Janis H. Tomecek brought an action in the Berrien County Trial Court, Civil Division, against Andrew L. Bavas and others, seeking declaratory and other relief with regard to an easement that benefited the plaintiffs' landlocked lot. Because of a restrictive agreement, the plaintiffs could not build a home on the lot unless they obtained access to a sewer line. The easement in question, labeled a "drive easement" on the plat, gave the plaintiffs ingress to and egress from their lot, and they sought to use the easement for public utilities. The court, Paul L. Maloney, J., granted the plaintiffs' motion for summary disposition with regard to the need for declaratory relief concerning the scope of the easement, but concluded that the drive easement granted only a right of passage over the land. The court granted the defendants' motion for summary disposition on the issue of an easement by necessity for public utilities. The court, however, also concluded that the plaintiffs had met their burden under MCL 560.221 and 560.226(1) of the Land Division Act (LDA), MCL 560.101 *et seq*., to support a revision of the plat to include a utility easement, granted summary disposition for the plaintiffs on that issue, and entered an order revising the plat in that manner. Several defendants appealed (hereafter referred to as "the defendants"), and the plaintiffs cross-appealed. The Court of Appeals, HOEKSTRA and OWENS, JJ. (ZAHRA, P.J., dissenting), affirmed, holding that the LDA gave trial courts the power not only to correct errors, but also to alter a plat to affect the underlying substantive property interests. The Court further held that, had the trial court not revised the plat to allow a utility easement, the plaintiffs would have been entitled to a utility easement by necessity. 276 Mich App 252 (2007). The Supreme Court granted leave to appeal. 480 Mich 1195 (2008).

In an opinion by Justice KELLY, joined by Chief Justice TAYLOR, an opinion by Justice CAVANAGH, joined by Justice WEAVER, and an opinion by Justice WEAVER, the Supreme Court *held*:

It was the intent of the original grantors to allow utility access to the plaintiffs' property through the central drive easement, and the restrictive covenant does not bar the easement or the erection of a building on the lot at issue now that municipal sewer service has become available.

In an opinion by Justice KELLY, joined by Chief Justice TAYLOR, and an opinion by Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, the Supreme Court *held*:

The LDA does not give trial courts the authority to alter property rights, and it is unnecessary to reach the question whether the doctrine of easement by necessity should be expanded to include utilities access.

Affirmed in part, reversed in part, and vacated in part.

Justice KELLY, joined by Chief Justice TAYLOR, stated that, because there is a strong inference that the words "drive easement" were intended to have the same meaning on the central easement and the south easement of the plat, it may be inferred that the original grantors intended the two easements to have the same scope, which includes access both for utilities and for ingress and egress. To allow the defendants to use their drive easement for utilities while preventing the plaintiffs from doing the same would be a preposterous result. Further, although the LDA allows a court to order a recorded plat or any part of it to be vacated, corrected, or revised, a plat is only a map that describes the physical property interests on a particular area of land; it is not, by itself, a determination of substantive property interests. Accordingly, the LDA was not intended to enable a court to establish an otherwise nonexistent property right; it was intended only to allow a court to alter a plat to reflect property rights already in existence. Finally, it is unnecessary to reach the question whether the doctrine of easement by necessity should be expanded to include utilities access.

Justice CAVANAGH, joined by Justice WEAVER, stated that the plaintiffs' request for relief should be granted on the ground that the easement language was latently ambiguous and that the circumstances surrounding its writing showed that the grantors intended the plaintiffs' property to access utilities through the central drive easement. Although the issue regarding whether the LDA enables a court to alter property rights should not have been reached, the LDA does allow courts to alter property rights in at least some circumstances.

Justice WEAVER partially agreed and partially disagreed with the lead opinion's conclusions for the reasons stated in Justice CAVANAGH's opinion, which she joined.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, stated that the LDA does not give trial courts the authority to alter substantive property rights and that there was insufficient evidence to support a conclusion that the grantors intended the plaintiffs' easement to encompass utilities access. Moreover, it is unnecessary to reach the question whether the doctrine of easement by necessity should be expanded to include utilities access.

PROPERTY — LAND DIVISION ACT — PLATS — REVISION OF PLATS.

The provisions of the Land Division Act that give circuit courts the authority to order the alteration of a plat cannot be used to create substantive property rights (MCL 560.221; MCL 560.226[1]).

Warner Norcross & Judd LLP (by *Devin S. Schindler*, *John J. Bursch*, and *Matthew T. Nelson*), for the plaintiffs.

Dickinson Wright PLLC (by *Jeffery V. Stuckey*, *Kevin J. O'Dowd*, and *Phillip J. DeRosier*) and *DeFrancesco Dienes P.C.* (by *Scott A. Dienes*) for the defendants.

Amici Curiae:

Kelley Cawthorne, PLLC (by *Frank J. Kelley* and *Steven D. Weyhing*), for the Walloon Lake Association.

Law, Weathers & Richardson, P.C. (by *Clifford H. Bloom*) for the Michigan Lake & Stream Associations, Inc.

KELLY, J. This case involves real property to which plaintiffs seek an easement for the purpose of connecting to a city sewer across the lots of their neighbors. The issues are (1) whether the Land Division Act (LDA)[1] can be used to create substantive property rights, such as a utility easement, (2) whether an easement by necessity for utilities should be allowed in this case, and (3) whether the restrictive covenant that runs with the land in question bars the easement.

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[1] MCL 560.101 *et seq*.

The Court of Appeals held that the LDA provides for substantive changes to property rights and gives the trial court the authority to revise the plat to allow a utility easement. It also concluded that an easement by necessity for utilities could appropriately be created in this case and that the restrictive covenant does not bar the easement.

We affirm the result of the Court of Appeals opinion and conclude that the original grantors intended to allow utility access to the Tomeceks' property through the central drive easement. We agree that the restrictive covenant does not bar the easement. However, we reverse the Court of Appeals holding that the LDA can alter substantive property rights. Finally, it was unnecessary for the Court of Appeals to address whether an easement by necessity should be recognized in Michigan and applied in this case. Therefore, we affirm the Court of Appeals opinion in part, reverse it in part, and vacate it in part.

FACTS

Plaintiffs Frank and Janis Tomecek own property in the O. T. Henkle subdivision along Lake Michigan in Berrien County. They wish to build a house on their property (Lot 2).[2] Defendants claim that a restrictive covenant that runs with the plat prevents plaintiffs from erecting a building on Lot 2. The covenant states that a house cannot be built on Lot 2 "unless and until a municipal sanitary sewer line is made available to the premises."

Because Lot 2 is landlocked, plaintiffs have an easement[3] (the central easement) over Lots 1 and 3 through

[2] Plaintiffs' property is shown as "2" on the map at the end of this opinion.

[3] The easement is shown on the lower center of the diagram appended to this opinion and runs from Lake Shore Road to Lot 2.

which they access their property from Lake Shore Road. Plaintiffs claim that they are entitled to use the central easement to gain access to the municipal sewer line.

A familiarity with the history of the O. T. Henkle subdivision is helpful in understanding this case. In the early 1920s, O. T. Henkle acquired approximately five acres of land on Lake Michigan in Chikaming Township, Berrien County. The property passed from O. T. Henkle to C. W. Henkle, Gladys Farclough, and Jane H. Henkle (collectively referred to as "the original grantors").[4] In 1967, the original grantors conveyed what is now Lot 1 to one of the defendants, reserving an easement for the benefit of Lot 2. The easement runs from Lake Shore Road along the southern boundary of Lot 1.[5]

Over the next few years, the original grantors sold Lots 3, 4, and 5, all subject to an easement running along the southern portion of the property ("the south drive easement").[6] Lots 3 and 4 were also subject to the central drive easement.[7] In 1975, the plat was recorded in the county records. At the time of platting, Lots 3, 4, and 5 used the south drive easement for utilities access[8] and for right-of-way access. Also, in 1975, the original grantors recorded a restrictive covenant prohibiting the construction of a building on Lot 2 until a municipal sanitary sewer service was made available to the pre-

[4] Jane Henkle is the mother of plaintiff Janis Tomecek.

[5] The easement is located on the central easement on the map, where the word "Drive" is printed.

[6] The easement is labeled "Drive Easement" and shown on the left side of the map.

[7] The left half of the central easement, where the word "Easement" appears on the map.

[8] The south easement provided Lots 3, 4, and 5 with telephone and electrical access.

mises.[9] Thus, when the property was platted in 1975, both the central and south easements were identically identified as "drive easement" on the plat, and the south easement already had utilities on it.

In 1976, the original grantors conveyed Lot 2 to plaintiffs. When plaintiffs bought Lot 2, the original grantors provided them with a drawing showing a good spot to build a home on the lot.[10]

PROCEDURAL HISTORY

In 2001, plaintiffs requested a variance from the Chikaming Township Zoning Board of Appeals to construct a home on their lot. When the board granted the variance, defendants appealed, claiming that the restrictive covenant prevented plaintiffs from building a home because they did not have sewer access. The trial court granted summary disposition to plaintiffs, ruling that the original grantors intended to allow plaintiffs to build a home on Lot 2. The trial court observed that defendants had already run utility lines on the south easement, and plaintiffs deserved to do the same with their central easement.

A divided Court of Appeals panel affirmed the trial court's decision in a published opinion.[11] It held that the LDA[12] empowered the trial court to revise the plat to

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[9] Plaintiffs and defendants disagree about the meaning of "premises" in the restrictive covenant. Plaintiffs contend "premises" refers to the subdivision as a whole, whereas defendants claim it refers exclusively to Lot 2.

[10] In 1969, before plaintiffs acquired the property, the original grantors gave them another drawing showing a desirable location for a home on Lot 2.

[11] *Tomecek v Bavas*, 276 Mich App 252; 740 NW2d 323 (2007).

[12] The LDA allows a trial court to vacate, correct, or revise a plat. MCL 560.226(1).

include utilities in the central easement. The LDA, it concluded, permits a trial court to do more than merely correct errors; it may alter a plat to affect underlying substantive property rights. The Court of Appeals held, in addition, that plaintiffs were entitled to an easement by necessity for utilities.

STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition.[13] The extent of a party's rights under an easement is a question of fact, and a trial court's determination of the facts is reviewed for clear error.[14] The proper interpretation and application of a statute presents a question of law that we consider de novo.[15]

THE CENTRAL EASEMENT INCLUDED UTILITY ACCESS AT THE TIME OF PLATTING

We must determine if the central easement running from Lake Shore Road to Lot 2 includes utility access, or if its use is strictly limited to ingress and egress. Under well-established Michigan law, "[t]he use of an easement must be confined strictly to the purposes for which it was granted or reserved."[16] Exacting "magic words" are not required on a plat to create an easement.[17] When interpreting deeds and plats, Michigan courts seek to

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[13] *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

[14] *Id*.

[15] *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

[16] *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957).

[17] See *Chapdelaine v Sochocki*, 247 Mich App 167, 170; 635 NW2d 339 (2001).

effectuate the intent of those who created them.[18]

Plaintiffs assert that, when the original grantors platted the subdivision, they assumed that both the south easement and the central easement included access for utilities. Defendants assert the contrary and add that Lot 2 was always intended to remain vacant.

It is undisputed that the central and south easements are identically labeled "drive easement" on the plat. At the time of platting, the central easement was used only for ingress and egress to Lot 2; there were no utilities on the easement. However, the south easement was used both as a driveway and for telephone and electrical lines to Lots 3, 4, and 5.

We find a strong inference that the words "drive easement" on the central easement were intended to have the same meaning as "drive easement" on the south easement. We conclude that the original grantors would have labeled the easements differently had they intended to allow utilities on the south easement, but not on the central easement. And we conclude that the original grantors intended the central and south easements to have the same scope: both road access for ingress and egress and utility access.

As early as 1883, Michigan courts recognized that a party using a right-of-way for a particular purpose cannot prevent a subsequent party from making the same use of the property. In *Bell v Todd,* the plaintiffs sought to enjoin the defendant from blocking access to a road that was platted but never constructed.[19] Plaintiff Bell had previously blocked unbuilt roads in the same plat. The Court dismissed the case, stating:

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[18] See *Curran v Maple Island Resort Ass'n*, 308 Mich 672, 679-681; 14 NW2d 655 (1944).

[19] *Bell v Todd*, 51 Mich 21; 16 NW 304 (1883).

> [I]t also appears that Railroad street south of South street is enclosed and occupied by Bell himself, so that he is doing in his own individual interest in respect to this very street precisely what he seeks to enjoin defendant from doing. It would be preposterous to grant the relief prayed for on his application under such circumstances.[20]

Although two streets, not one, are involved here, we believe *Bell* is instructive. Defendants use their "drive easement" for utilities and seek to prevent plaintiffs from using their "drive easement" for the same purpose. In the words of Justice COOLEY in *Bell*, to allow such a result would be "preposterous."

It is apparent, also, that the grantors envisioned that a house would be built on Lot 2 and, by extension, that the central easement would include utilities. This may be gleaned from two drawings by C. W. Henkel, one of the original grantors. The first was made in 1969, six years before the subdivision was platted. It shows Lot 2 and the adjacent lot to the east, Lot 1. On Lot 2 is a rectangle with the words "possible house location and dimensions." The central easement is shown on the drawing.

C. W. Henkle made a second drawing in 1978, three years after the subdivision and easements were platted. Like his first drawing, it shows a location on Lot 2 where plaintiffs could build a home. The central easement is visible on the drawing. It is significant that C. W. Henkle included the central easement in his drawings of Lot 2 with a house. He knew then that no house could be erected there until the lot had access to a sewer line. He knew, also, that the central easement was the only likely route to provide that access. Taken together, these drawings provide further evidence of intent that the central drive easement should include utilities.

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[20] *Id*. at 28.

Finally, contrary to the defendants' claim, the wording of the restrictive covenant shows that the original grantors always intended that a house could be built on Lot 2. When attempting to discern the parties' intent, we construe together contemporaneous documents relating to the same transaction.[21] The restrictive covenant on Lot 2 was executed contemporaneously with the plat; therefore, it is relevant in discerning the parties' intent at the time.

It does not make sense that the original grantors would have inserted language regarding a sewer in the restrictive covenant had they intended that no building ever be placed on Lot 2. If they had really intended to forever prevent building on Lot 2, they would have simply covenanted that no building ever be put there. The reference to a sewer makes sense, however, if the grantors' intent was to eventually allow a building on Lot 2. This becomes readily apparent when the geographical limitations of the plat are considered. The plat is approximately five acres in size. Only the eastern half is suitable for housing because a bluff runs along the middle of the property, descending to the beach and Lake Michigan. Therefore, the five lots suitable for residences adjoin each other on roughly the 2.5 easternmost acres of land.

In 1975, when the subdivision was platted and the restrictive covenant was written, none of the lots had access to a municipal sewer system. Septic tanks[22] were

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[21] *Interstate Constr Co v United States Fidelity & Guaranty Co*, 207 Mich 265, 274; 174 NW 173 (1919).

[22] A septic tank is a small-scale sewage treatment system common in rural areas where there is no access to a municipal sewer line. Wastewater enters the septic tank from a connected residence, and solids settle to the bottom. The remaining water flows out of the tank and is absorbed into the soil, which usually filters out the remaining impurities in the water. However, there must be adequate soil area to handle the waste-

the only plausible alternative for waste management on the lots. However, because of concerns over numerous septic systems and leach fields[23] in the relatively small area, a septic system was not an option for every lot.

Cognizant of this problem, the original grantors likely enacted the restrictive covenant to prevent construction of a house on Lot 2 until municipal sewer service became available to it. Hence, the restrictive covenant prevented overloading the small area of land with septic waste. When a municipal sewer system became available to the plat in the late 1970s, the condition in the restrictive covenant was satisfied. The restrictive covenant had served its purpose.

From this we conclude that it was the intent of the original grantors that a house could be built on Lot 2 when a municipal sewer became available. We conclude also that the central "drive easement" was intended, like the south "drive easement," to provide access to the sewer and other utilities.

EFFECT OF THE RESTRICTIVE COVENANT

Defendants maintain that the restrictive covenant of 1974 intended to prohibit any building on the property until the end of time. They argue that the plain language of the restrictive covenant reflects this.

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water coming from the tank or the surrounding area will be damaged. This is especially likely when septic tanks are located on property near a body of water (like the property in this case that borders Lake Michigan), because the sandy soil can easily become saturated with chemicals. This pollutes the surrounding area and surface water, causing serious harm to fish, plants, and other wildlife. See Craig G. Cogger, *Septic System Waste Treatment in Soil* <http://cru.cahe.wsu.edu/CEPublications/eb1475/eb1475.html> (accessed December 12, 2008); see also *Septic Systems for Waste Water Disposal*, available at <http://www.agwt.org/info/septicsystems.htm> (accessed December 12, 2008).

[23] A leach field is the area of land where the wastewater from a septic tank is deposited.

The restrictive covenant states, "It is hereby covenanted and agreed that no building, structure or dwelling shall be constructed on Lot 2 of said plat unless and until a municipal sewer line is made available to the premises." Defendants claim that the covenant prohibits building a home on Lot 2 until the owners of Lots 1, 3, and 4, explicitly grant permission to create an easement for municipal sewer service.

This interpretation is not reflected in the words of the covenant. As the trial court pointed out:

> A plain reading of this restriction contradicts Defendant's [sic] argument: if the grantors wanted to forever preclude any construction on Lot 2, the restriction would have stated as much in explicit language by ending the provision after the word "plat" [so that it read "[t]hat it is hereby covenanted and agreed that no building, structure or dwelling shall be constructed on Lot 2 of said plat"]. Defendants' argument in this regard must therefore fail.

The restrictive covenant merely prevented construction on Lot 2 until sewer service became available to that lot.

THE LDA CANNOT ALTER SUBSTANTIVE PROPERTY RIGHTS

The LDA provides a process for surveying and marking subdivided property. Property information is compiled on a plat that is then recorded with the local municipality. The LDA allows a circuit court to vacate, correct, or revise a recorded plat.[24] Defendants argue that the LDA permits a court to alter a plat map only to properly reflect existing property rights; it cannot affect the substantive rights of the underlying property owners.

When construing the LDA, we are mindful that our primary goal is to ascertain and give effect to the

[24] MCL 560.221.

Legislature's intent.[25] When determining intent, we consider first the language of a statute.[26] The LDA allows a court to "order a recorded plat or any part of it to be vacated, corrected, or revised . . . ."[27] "Plat" is defined in the act as "a map or chart of a subdivision of land."[28]

The LDA defines a plat as a map. A plat is a description of the physical property interests on a particular area of land. A map, by itself, is not a determination of substantive property interests. If one "revises" a map of the United States to show Michigan encompassing half of the country, it does not make it so. The LDA was never intended to enable a court to establish an otherwise nonexistent property right. Rather, the act allows a court to alter a plat to reflect property rights already in existence.

In this case, the LDA did not create new substantive property rights when the circuit court altered the plat to reflect that the central easement encompasses utility access. This right existed with respect to the central easement since its inception, when the original grantors recorded the central easement intending it to include utilities. The trial court merely used the LDA as the tool to validate property rights that already existed.

CONCLUSION

In 1975, when the O. T. Henkle subdivision was platted, it was the intent of the grantors that the central easement could include utilities. This holding is supported by the fact that, on the plat, the central ease-

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[25] *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

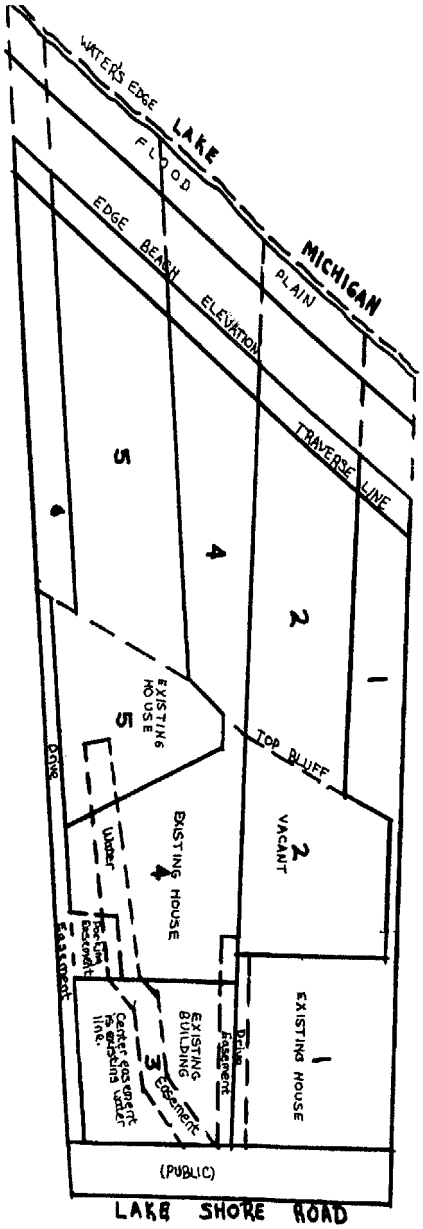
[26] *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998).

[27] MCL 560.226(1).

[28] MCL 560.102(a).

ment and the south easement are both labeled the same. It is undisputed that the south easement was a driveway and had utilities at the time of platting. The language of the restrictive covenant that runs with the plat supports this holding. The covenant prevented a house from being built on Lot 2 until a municipal sewer system could be made available to the lot. Hence, once a sewer line became available, the covenant allowed a house to be built on Lot 2. Therefore, we affirm the Court of Appeals judgment. However, we reverse its holding concerning the LDA. The LDA cannot be used to create substantive property rights. Regarding the Court of Appeals dicta creating an easement by necessity for utilities, we decline to address whether such an easement is available in Michigan, it being unnecessary to resolve the case. The result reached by the Court of Appeals is affirmed on the basis of the intent of the grantors.

TAYLOR, C.J., concurred with KELLY, J.


WATERS EDGE
LAKE
FLOOD
EDGE BEACH
ELEVATION
MICHIGAN
PLAIN
TRAVERSE LINE
5
4
2
1
EXISTING HOUSE
5
TOP BLUFF
DRIVE
UNDER
EXISTING HOUSE
4
2
VACANT
Center easement is existing water line.
3
Easement
EXISTING BUILDING
Drive easement
EXISTING HOUSE
1
(PUBLIC)
LAKE SHORE ROAD

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the result of the lead opinion because I agree that plaintiffs' request for relief should be granted. I write separately to clarify my view that the circumstances surrounding the easement's creation show that it contains a latent ambiguity and that the original grantors intended to allow utility access to plaintiffs' property through the central drive easement. I respectfully dissent, however, from the lead opinion's holding that the Land Division Act (LDA) does not grant courts the power to alter substantive property rights.

I. INTENT OF THE ORIGINAL GRANTORS

I concur with the lead opinion's conclusion that the original grantors intended plaintiffs' property to have access to utilities through the central drive easement, and I would grant plaintiffs' request for relief.[1] I also concur with the lead opinion's conclusion that the restrictive covenant does not bar plaintiffs from building on their property.

As the lead opinion noted, the cardinal rule of interpreting deeds and plats is to effectuate the intent of the parties. *Ante* at 490-491. To effectuate this rule, in light of the principle of freedom of contract, this Court has generally observed that "[i]f the language of a contract is clear and unambiguous, it is to be construed according to its plain sense and meaning . . . ." *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 197-198; 702 NW2d 106 (2005) (citation and quotation marks omitted). Where a contract is ambigu-

[1] This holding applies to the southern half of the central drive easement. The northern half of the central drive easement was reserved before platting, and with language distinct from the language used in the south drive easement.

ous, however, this Court may use extrinsic evidence to determine the intent of the parties. *Id.* at 198.

Extrinsic evidence may sometimes also be used to detect an ambiguity in a contract, depending on whether the ambiguity is latent or patent. *Id.* A patent ambiguity " 'clearly appears on the face of a document, arising from the language itself.' " *Id.*, quoting Black's Law Dictionary (7th ed). Extrinsic evidence is generally not necessary to detect a patent ambiguity. In contrast, a latent ambiguity " 'does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed.' " *Id.* Where there is a latent ambiguity, extrinsic evidence may be used not only to resolve the ambiguity, but also to prove the existence of the latent ambiguity. *Grosse Pointe Park,* 473 Mich at 198. See also *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964); *Ives v Kimball*, 1 Mich 308, 313 (1849). In *Ives*, after explaining that a latent ambiguity may be shown by parol evidence, this Court highlighted the importance of this doctrine by stating that

> [t]here is no more useful, just and practical rule of law, than that which admits evidence of surrounding circumstances and collateral facts, within certain well defined limits, for the purpose of enabling courts to ascertain and carry into effect the intention of contracting parties. The cases in which this rule has been applied are almost innumerable. [*Ives,* 1 Mich at 313.]

This Court has applied the latent ambiguity doctrine to give easement language a meaning that becomes apparent only in light of the surrounding circumstances. See *Keller v Paulos Land Co*, 381 Mich 355; 161 NW2d 569 (1968); *McConnell v Rathbun*, 46 Mich 303; 9 NW 426 (1881). *Keller* is particularly instructive in this case. In *Keller*, the parties disagreed over the

purpose of a "nonexclusive easement of ingress and egress," where the easement was landlocked within the defendant's property. *Keller*, 381 Mich at 360. The defendant argued that, in context, it was clear that the easement was only intended to be used for parking. *Id.* at 360-361. This Court concluded that the language was ambiguous because a landlocked easement is "not a use of ingress and egress within the common legal meaning," and accordingly it was appropriate for the Court to use oral testimony to determine the true intent of the parties. *Id.* at 362.

Similarly, in this case, the surrounding circumstances show that there was a latent ambiguity; therefore, extrinsic evidence should be used to determine and effectuate the intent of the parties. The central and south drive easements were described in the deeds as "a non-exclusive right of way for driveway purposes." "Driveway purposes" is not so unclear as to create a patent ambiguity. But the parties' use of the south drive easement for utilities at the time the easements were created suggests that, as in *Keller*, the parties' understanding of "driveway purposes" was not limited to its "common legal meaning." *Keller*, 381 Mich at 362. Because there is a latent ambiguity, the court may look to extrinsic evidence to determine the intent of the parties. As explained in the lead opinion, extrinsic evidence shows that the grantors intended that the central easement could be used for utilities access for plaintiffs' property. Therefore, I concur that plaintiffs should be granted relief.

II. LAND DIVISION ACT[2]

I respectfully dissent from the holding that the LDA does not grant courts the power to alter substantive

[2] MCL 560.101 *et seq*.

property rights. I think that the majority that reached that holding errs in addressing this issue in this case. I also think that its reasoning is flawed and that its conclusion is too broad.

Most importantly, I do not think that it is necessary for this Court to reach this issue in this case. The lead opinion states that "[i]n this case, the LDA did not create new substantive property rights when the circuit court altered the plat to reflect that the central easement encompasses utility access" because "[t]his right existed with respect to the central easement since its inception . . . ." *Ante* at 496. I agree. Accordingly, it is irrelevant to the outcome of this case whether, as a general proposition, the LDA allows courts to alter the underlying substantive rights of the property owners. Therefore, this Court does not need to address this issue.

Nonetheless, as I am forced to discuss it, I tend to disagree with the lead opinion's conclusion that "[t]he LDA was never intended to enable a court to establish an otherwise nonexistent property right." *Ante* at 496. I think that there are some flaws in the lead opinion's reasoning and that this conclusion is too broad.

Both MCL 560.221 and 560.226(1) state that courts may vacate, correct, or revise a recorded plat. Section 226(1) lists several exceptions to this power, but otherwise does not explain when or why courts should vacate, correct, or revise a plat. The lead opinion reasons that the LDA's grant of power to the courts to vacate, correct, or revise a plat is not a substantive power because the act defines a plat as a map, and everybody knows that revising a map does not automatically revise the underlying substantive property rights. Regardless of whether the majority on this issue is correct in

concluding that the LDA does not permit courts to alter property rights, I do not think that its reasoning is focused on the proper question.

The relevant question is not whether a plat is a map; rather, the question is whether the Legislature intended to give courts the power to alter substantive property rights by revising a map under the circumstances in a given case. The lead opinion gives as an example that "[i]f one 'revises' a map of the United States to show Michigan encompassing half of the country, it does not make it so." *Ante* at 496. This statement is of course true of the average judge sitting at home with a book of Rand McNally maps and a permanent marker. But, if a duly empowered Legislature passed a statute stating that when a court revises the boundaries of a map, that revision has the legal effect of changing the boundaries, then a court's revision of a map would indeed create a substantive change.[3] If the lead opinion's conclusion is correct, the reason it is correct cannot be that a revision to a map, by definition, can never alter substantive property rights.

In addition to disagreeing with the lead opinion's reasoning, I tend to think that the lead opinion's statement that the LDA never permits courts to alter property rights through its power to vacate, correct, or

[3] The act itself demonstrates that the Legislature in some instances intended that a plat not only reflect existing property rights, but also be the sole legal basis for creating that right. For example, MCL 560.253(1) states that "every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked . . . ." Under this provision of the LDA, if a plat is amended to include a dedication, then that amendment creates a property right. In other words, the act of amending the plat also amends a property right.

revise a plat is too broad.[4] Instead, I would state that the Legislature intended MCL 560.221 and 560.226(1) to permit courts to alter property rights in at least some circumstances. I will not attempt to exhaustively determine when the LDA grants courts the power to alter property rights because the facts of this case do not present a suitable basis for analyzing these issues. Regardless, I believe that this Court's approach to this issue should be more cautious, nuanced, and case-specific than the approach taken by the lead opinion.

CONCLUSION

I would affirm the Court of the Appeals result and vacate its reasoning. I think that the easement language was latently ambiguous and that the circumstances surrounding its writing show that the grantors intended plaintiffs' property to access utilities through the central drive easement. I respectfully dissent from the holding that the LDA never enables a court to alter property rights.

WEAVER, J., concurred with CAVANAGH, J.

WEAVER, J. (*concurring in part and dissenting in part*). I partially concur with and dissent from the lead

[4] For example, this Court has stated that § 226(1) is the *exclusive* remedy for landowners seeking to vacate, revise, or correct a private dedication. *Martin v Beldean*, 469 Mich 541, 542-543; 677 NW2d 312 (2004). Vacating a dedication on a plat alters property rights; if § 226(1) is the "exclusive" way to make this change, then it must be that the statute itself permits courts to alter property rights. In *Martin*, this Court held that a plaintiff had to bring an action to void a private dedication under the LDA and not as an action to quiet title. *Martin*, 469 Mich at 550-552. If the LDA was not the legal basis for the court's power to void a dedication, then this Court would have held that the plaintiff was required to bring an action to quiet title *and* an action under the LDA.

opinion's conclusions for the reasons stated in Justice CAVANAGH's partial concurrence and partial dissent, which I join.

YOUNG, J. (*concurring in part and dissenting in part*). I concur with Justice KELLY's opinion insofar as it holds that the Land Division Act does not give trial courts the authority to alter substantive property rights and it declines to address the common-law doctrine of easements by necessity. I write only to express misgivings with regard to her disposition on whether the grantors of the plaintiffs' easement intended to give the plaintiffs utilities access in addition to ingress and egress. Justice KELLY's explanation that the grantors intended that the plaintiffs use their easement in the same manner that the defendants used their easement at the time of the grant is plausible (and quite possibly correct).[1] Nevertheless, I am not convinced that the mere fact that the defendants have used their easement for utilities access gives the plaintiffs the right to use their *separate* easement similarly. Because there is insufficient evidence of the grantors' actual intent concerning the plaintiffs' *particular* easement at the time the easement was created, I cannot assent to Justice KELLY's ultimate result that interprets the plaintiffs' easement as encompassing utilities access. I therefore respectfully dissent from Justice KELLY's determination of the grantors' intent, although I concur with Justice KELLY insofar as she interprets the Land Division Act and declines to reach the common-law doctrine of easements by necessity.[2] Rather than affirm the Court of Appeals result,

[1] Although there are many nominal defendants in this case, I use the term "defendants" throughout this opinion to refer only to those defendants who own property in the O. T. Henkle Subdivision.

[2] Because this case came before this Court on cross-motions for summary disposition, and because the question of the grantors' intent

which grants the plaintiffs' motion for summary disposition, I would instead remand this case to the Berrien County Trial Court for trial.

CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

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would remain open on remand, it is not necessary at this point for me to determine whether the doctrine of easement by necessity should be expanded to include utilities access.

MOORE v SECURA INSURANCE

Docket No. 135028. Argued October 2, 2008. Decided December 30, 2008.

Hattie and James Moore brought an action in the Genesee Circuit Court against Secura Insurance, seeking no-fault insurance benefits for injuries sustained by Hattie Moore (hereafter plaintiff) in an automobile accident. The plaintiff had filed an application for benefits with the defendant seeking work-loss benefits, personal protection insurance (PIP) benefits, and uninsured motorist benefits for pain and suffering. The defendant had paid work-loss and injury benefits for approximately one year until a doctor retained by the defendant to conduct an independent medical examination (IME) concluded that the plaintiff's injuries caused by the accident had healed and that her remaining injuries were caused by preexisting conditions. The jury awarded the plaintiff $50,000 in noneconomic damages for the uninsured motorist claim, $42,755 for unpaid work-loss for the PIP claim, and $98.71 in penalty interest for overdue work-loss benefits. The court, Thomas L. Brown, J., granted the plaintiff's motion for attorney fees and, pursuant to MCL 500.3148, awarded the plaintiff $79,415 in attorney fees and costs. The defendant appealed, alleging that the trial court erred both in its decision to grant attorney fees and costs and with regard to the amount awarded. The Court of Appeals, SAWYER and DAVIS, JJ. (WILDER, P.J., dissenting), affirmed the trial court's conclusion that the denial of benefits was unreasonable because the defendant made no inquiry beyond the opinion of the doctor who conducted the IME, and therefore held that the conditions for an attorney fee award under MCL 500.3148 were satisfied because the jury found that at least some of the benefit payments were overdue. The Court rejected the defendant's claim that the plaintiff was entitled only to the portion of the attorney fees directly attributable to securing the penalty interest award. 276 Mich App 195 (2007). The Supreme Court ordered and heard oral argument on whether to grant the defendant's application or take other peremptory action. 482 Mich 883 (2008).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR and Justices YOUNG and MARKMAN, the Supreme Court *held*:

The Court of Appeals erred in its interpretation of MCL 500.3142 and MCL 500.3148. Because the jury awarded the plaintiff only $98.71 in penalty interest and failed to award penalty interest on the $42,755 in unpaid work-loss benefits, those benefits are not overdue under MCL 500.3124(2). Further, the discontinuation of the plaintiff's benefits was reasonable under MCL 500.3148(1). Nothing in MCL 500.3148(1) requires an insurer to reconcile conflicting medical opinions. Because the plaintiff offered no additional reasons to support the unreasonableness of the defendant's refusal to pay benefits, the plaintiff is not entitled to attorney fees. An insurer's initial refusal to pay no-fault insurance benefits cannot be deemed unreasonable if it is later determined that the insurer was not required to pay those benefits.

1. The Court of Appeals erred by failing to follow the unambiguous language of MCL 500.3142 and MCL 500.3148, which establish that attorney fees are payable only for overdue benefits that the insurer has unreasonably refused to pay or unreasonably delayed in paying. In this case, despite instructions from the trial court and on the verdict form, the jury declined to award penalty interest on the $42,755 in unpaid work-loss benefits that it awarded the plaintiff, although it did award $98.71 in penalty interest, which represents one week of delayed work-loss benefits. The jury effectively found that only one week of work-loss benefits was overdue. Therefore, the jury must have found that the $42,755 in work-loss benefits was not overdue under the plain meaning of MCL 500.3142 and MCL 500.3148. While this result seems inconsistent, the jury may have concluded that the preexisting osteoarthritic degeneration in the plaintiff's knees cast doubt on whether the defendant had reasonable proof of accident-specific injuries for which payment was due, or it may have concluded that the defendant should not be faulted for its computer glitch where the plaintiff did not promptly notify the defendant about the error. Because an interpretation of the evidence provides a logical explanation for the jury's finding, it must be upheld.

2. Nothing in the plain language of MCL 500.3148(1) and nothing otherwise implicit in the statute requires an insurer to reconcile conflicting medical opinions. Accordingly, *Liddell v Detroit Automobile Inter-Ins Exch*, 102 Mich App 636 (1981), which held the contrary, is overruled, and defendant's termination of plaintiff's work-loss benefits without attempting to reconcile the opinions of its independent medical examiner and plaintiff's treating physicians in this case was not unreasonable.

3. The jury found that $822.52 or only one week of plaintiff's unpaid work-loss benefits was overdue, and defendant already had

paid plaintiff $822.52 for one week of work-loss benefits and all other payments that defendant owed as a result of the computer glitch before the case went to trial. Because plaintiff did not attribute any of the $79,415 that the trial court awarded her in attorney fees and costs to collecting $822.52 in overdue work-loss benefits, plaintiff is not entitled to attorney fees. Moreover, because the defendant did not unreasonably refuse to pay work-loss benefits, plaintiff is not entitled to attorney fees incurred to collect the $42,755 awarded by the jury. The only reason that plaintiff contended that the defendant's refusal to pay benefits was unreasonable under MCL 500.3148(1) was its failure to reconcile the opinions of its independent medical examiner and plaintiff's treating physicians, a proposition that has already been rejected.

4. An insurer's initial refusal to pay no-fault benefits can be deemed reasonable even if it is later determined that the insurer was required to pay those benefits. However, this does not imply that an insurer's initial refusal to pay no-fault insurance benefits can be deemed unreasonable, even though it is later determined that the insurer did not owe those benefits. If an insurer does not owe benefits, then benefits cannot be overdue for purposes of determining whether attorney fees may be awarded.

Reversed and remanded for further proceedings.

Justice KELLY, joined by Justice WEAVER, dissenting, would affirm the trial court's award of attorney fees and its determination that the defendant's behavior was unreasonable, stating that the majority opinion improperly substituted its judgment for that of the trial court and ignored the deferential standards of review applicable in this case. She also would not overrule *Liddell*.

Justice CAVANAGH did not participate because of a familial relationship with counsel for Secura Insurance.

1. INSURANCE — NO-FAULT — PAYMENT OF CLAIMS — INDEPENDENT MEDICAL EXAMINATIONS.

An insurer is not statutorily required to reconcile the opinions of its independent medical examiner and an insured's treating physician before refusing to pay work-loss benefits (MCL 500.3142[2], MCL 500.3148[1]).

2. INSURANCE — NO-FAULT — DELAY IN PAYMENT OF CLAIMS — ATTORNEY FEES.

An insurer's initial refusal to pay no-fault insurance benefits cannot be deemed unreasonable for purposes of awarding attorney fees if it is later determined that the insurer was not required to pay those benefits (MCL 500.3148[1]).

Joliat, Tosto & Bade, PLC (by *Peter M. Bade*), for the plaintiffs.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh* and *Peter L. Diesel*), for the defendant.

CORRIGAN, J. In this case, we consider the assessment of attorney fees for "overdue" benefits under Michigan's no-fault insurance statutes. MCL 500.3101 *et seq*.[1] Under these statutes, personal protection insurance

[1] The relevant statutory provisions of MCL 500.3101 *et seq*. provide:

MCL 500.3142:

(1) Personal protection insurance benefits are payable as loss accrues.

(2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(3) An overdue payment bears simple interest at the rate of 12% per annum.

MCL 500.3148:

(1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

benefits become "overdue" when an insurer fails to pay "within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). "An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal . . . protection insurance benefits which are overdue." MCL 500.3148(1). Moreover, "the attorney's fee shall be a charge against the insurer . . . if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." *Id*. Therefore, whether a claimant's benefits qualify as overdue and whether an insurer unreasonably refused to pay or unreasonably delayed in making payment determine if a claimant's attorney may receive attorney fees.

In this case, a jury awarded plaintiff $50,000 in noneconomic damages and $42,755 in unpaid work loss benefits after defendant insurer stopped paying personal protection insurance benefits. The jury also awarded $98.71 in penalty interest for overdue work loss benefits. The trial court granted plaintiff's motion for attorney fees and costs, and the Court of Appeals affirmed.

Because the Court of Appeals erred in its interpretation of MCL 500.3142 and MCL 500.3148, we reverse.

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(2) An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation. To the extent that personal or property protection insurance benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid.

Because the jury awarded plaintiff only $98.71 in penalty interest and failed to award penalty interest on the $42,755 awarded in unpaid work loss benefits, we conclude that those benefits do not qualify as overdue pursuant to MCL 500.3142(2). We also conclude that the discontinuation of plaintiff's benefits was reasonable under MCL 500.3148(1). Because plaintiff offered no additional reasons to support the unreasonableness of defendant's refusal to pay benefits, plaintiff is not entitled to attorney fees. Moreover, we reject the Court of Appeals erroneous statement that an insurer's initial refusal to pay no-fault insurance benefits can be deemed unreasonable even though it is later determined that the insurer was not required to pay those benefits.

I. FACTS AND PROCEDURAL HISTORY

On September 27, 2000, a pickup truck struck the passenger side of plaintiff Hattie Moore's automobile while she was driving on I-475 in Genesee County. Because of the accident, plaintiff fractured her right knee, causing a bone chip. Before the accident, plaintiff had suffered from osteoarthritis in both knees, and she had been treated by an orthopedic surgeon, Dr. Norman Walter. According to Dr. Walter, in November 1999, 10 months before the accident, he discussed knee replacement surgery and injection treatments with plaintiff.

After the accident, plaintiff could not return to her regular employment as a custodian. Defendant began paying plaintiff work loss and other no-fault benefits in December 2000. Defendant first paid plaintiff in December 2000. Because of a computer glitch, however, defendant did not make its next payment to plaintiff until March 2001. Before the trial, defendant rectified its error, paying plaintiff the omitted payments as well

as the 12 percent penalty interest that defendant owed. Dr. Walter recommended surgery on plaintiff's right knee to repair the injury caused by the accident. On January 22, 2001, Dr. Charles Xeller, a second orthopedic surgeon, performed an independent medical evaluation (IME) of plaintiff at defendant's request. Dr. Xeller agreed that plaintiff's right knee required surgery, which Dr. Walter performed on January 26, 2001.

Following surgery, plaintiff remained off work and continued treatment with Dr. Walter. In March 2001, defendant retained Dan Schingeck, a nurse case manager, to evaluate whether plaintiff could return to work. Schingeck met with Dr. Walter on August 30, 2001. After their meeting, Dr. Walter opined that plaintiff would never be able to return to her normal employment as a custodian. Dr. Walter's records do not reflect whether he attributed plaintiff's inability to work to her accident-related injuries or her preexisting osteoarthritis.

Defendant continued to pay work loss and other no-fault benefits until Dr. Xeller performed a second IME on September 25, 2001. After the second IME, Dr. Xeller prepared a seven page report for defendant. In his report, Dr. Xeller opined that plaintiff did not need further treatment for her orthopedic complaints related to the accident. Rather, he concluded that plaintiff had severe osteoarthritic degeneration in both knees that predated the accident, and that the accident had not exacerbated plaintiff's underlying osteoarthritis. Dr. Xeller determined that plaintiff could return to work with restrictions including, "no climbing, no walking on uneven ground, no kneeling or squatting, limited walking, and no overhead lifting." Additionally, Dr. Xeller opined that plaintiff needed a total left knee replacement and possibly a total right knee replacement in the future.

In November 2001, defendant discontinued plaintiff's no-fault benefits because reasonable proof of plaintiff's claim no longer existed on the basis of Dr. Xeller's report. Plaintiff filed suit, seeking first-party no-fault benefits from defendant. Plaintiff and her husband also filed a second suit seeking uninsured motorist benefits from defendant.

At trial, plaintiff sought approximately $96,000 in work loss benefits, $21,000 for household or replacement services, and more than $11,000 in penalty interest. The jury awarded plaintiff $42,755 in work loss benefits, no damages for household or replacement services, and only $98.71 in penalty interest for overdue payments. Plaintiff filed a postjudgment motion for no-fault attorney fees and costs under MCL 500.3148(1). After a hearing to determine attorney fees and costs, the trial court awarded plaintiff the full amount that she requested, $79,415.

Defendant appealed both the trial court's decision to grant attorney fees and costs and the amount of attorney fees and costs awarded to plaintiff. In a divided opinion, the Court of Appeals affirmed the trial court's award of $79,415 in attorney fees and costs.[2] Relying on a definition of unreasonableness from *Liddell v Detroit Automobile Inter-Ins Exch*, 102 Mich App 636, 650; 302 NW2d 260 (1981), the Court concluded that "the trial court properly found the denial of benefits here unreasonable where defendant made no inquiry beyond the opinion of its own IME doctor."[3] The Court held that the defendant insurer owed overdue benefits and that the plaintiff satisfied conditions for attorney fees when "it

[2] *Moore v Secura Ins*, 276 Mich App 195; 741 NW2d 38 (2007).

[3] *Moore*, *supra* at 202.

was determined below that the denial of the benefits was unreasonable, and the jury found at least some of the benefit payments overdue."[4] The Court held that the trial court did not abuse its discretion "in awarding plaintiff $79,415 in attorney fees when the jury awarded plaintiff only $98.71 in penalty interest" because an insurer may "unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them."[5]

Court of Appeals Judge KURTIS T. WILDER dissented.[6] Judge WILDER reasoned that plaintiff's benefits were not overdue and, therefore, plaintiff had no claim for attorney fees "[u]nder the unambiguous language of MCL 500.3148(1)."[7] Moreover, Judge WILDER concluded that, given the jury's award of $98.71 in penalty interest, it necessarily determined that defendant unreasonably had delayed payment of only one week of work loss benefits.[8] Judge WILDER further stated that, "[i]n my view, *no* part of the $79,415 in attorney fees and costs in this case was attributable to collecting the $822.52 overdue benefit, because that overdue benefit was paid long before litigation."[9] Therefore, Judge WILDER would have held "that the trial court erred as a matter of law in granting attorney fees, because the jury did not award overdue benefits to the plaintiff."[10] Defendant then applied for leave to appeal to this Court. We scheduled oral argument on the application and directed the parties to address:

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[4] *Id.*

[5] *Id*. at 203-204.

[6] *Id*. at 205.

[7] *Id*. at 208-209.

[8] *Id*. at 209.

[9] *Id*. at 214.

[10] *Id*. at 215.

(1) whether the benefits at issue were "overdue," MCL 500.3148(1), 500.3142(2); (2) whether defendant "unreasonably refused to pay the claim or unreasonably delayed in making proper payment," MCL 500.3148(1); (3) assuming defendant unreasonably refused to pay, but also assuming that only a portion of the benefits sought and awarded were "overdue," whether MCL 500.3148(1) permits recovery of attorney fees for all benefits sought and recovered; and (4) whether the Court of Appeals erred in suggesting that "it is . . . possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them." [*Moore v Secura Ins*, 482 Mich 883 (2008).]

II. STANDARD OF REVIEW

The Court reviews de novo issues of statutory interpretation. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews de novo questions of law, but we review findings of fact for clear error. *Id*. "A decision is clearly erroneous when 'the reviewing court is left with a definite and firm conviction that a mistake has been made.' " *Id.*, quoting *Kitchen v Kitchen*, 474 Mich 654, 661-662; 641 NW2d 245 (2002). Moreover, we review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri,* 481 Mich 519, 526; 751 NW2d 472 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id*.

III. LEGAL ANALYSIS

A. OVERDUE BENEFITS

"When interpreting statutes, our primary goal is to give effect to the intent of the Legislature." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). We review the language of the statute itself and give the words used by the Legislature their common and ordinary meaning. *Id*. "If the statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted." *Id*.

MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. First, the benefits must be overdue, meaning "not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). Therefore, assigning the words in MCL 500.3142 and MCL 500.3148 their common and ordinary meaning, "attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003) (emphasis omitted).

In this case, the verdict form instructed jurors to award "12 percent interest per annum from the date that the expense or loss became overdue." In contrast, the trial court's jury instructions simply directed jurors to award 12 percent interest with no indication that the 12 percent interest should be "per annum." Moreover, the trial court specifically instructed the jury that if

plaintiff did not provide reasonable proof for her entire claim, then it must award interest for any pro rata portion for which plaintiff did supply reasonable proof. While plaintiff requested more than $11,000 in penalty interest, defendant requested that the jury award plaintiff only $121.50 in penalty interest. Instead of awarding the amount requested by either party, the jury awarded only $98.71 in penalty interest.[11]

The jury's decisions to award plaintiff $42,755 in unpaid work loss benefits, but only $98.71 in penalty interest, seems inconsistent because if the jury had determined that the work loss benefits owed were overdue, then the jury instructions mandated that it award 12 percent penalty interest on the full amount of overdue benefits, as required by MCL 500.3142(3). This Court will uphold a jury's verdict, however, where " 'there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.' " *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31-32; 609 NW2d 567 (2000), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987).

The jury's conclusion that plaintiff was owed work loss benefits did not also *require* it to conclude that those benefits were overdue. It may have concluded that the preexisting osteoarthritic degeneration in plaintiff's knees cast doubt on whether defendant had reasonable proof of plaintiff's accident-specific injuries, and, therefore, whether payments were due under MCL 500.3142(2). The jury also may have concluded that defendant should not be faulted for its computer glitch where plaintiff did not promptly notify defendant about the error. The jury's award of $98.71 in penalty interest

[11] As Judge WILDER notes in his dissent, $98.71 is 12 percent of $822.52, and $822.52 represents the one week of delayed work loss benefits for which plaintiff provided reasonable proof. *Moore*, *supra* at 209.

represents exactly 12 percent of one week of plaintiff's work loss benefits, which defendant calculated at $822.52. Thus, the jury decided that only one week of work loss benefits was overdue. Because there is an interpretation of the evidence that provides a logical explanation for the jury's verdict, we uphold it.

MCL 500.3148(1) further provides that an attorney may only receive fees for representing a claimant in an action for "benefits which are overdue." In MCL 500.3142(2), the Legislature explains that overdue benefits are those benefits "not paid within 30 days after an insurer receives *reasonable proof of the fact and of the amount of loss sustained*." Neither MCL 500.3142(2) nor MCL 500.3148(1) permits the recovery of attorney fees for actions in which a court awarded plaintiff benefits that were reasonably in dispute, or, stated slightly differently, benefits not yet overdue.

In addition to being consistent with Judge WILDER's dissent,[12] our view coincides with another Court of Appeals decision in which a jury refused to award penalty interest because benefits were not overdue under MCL 500.3142. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612; 550 NW2d 580 (1996). In *Beach*, the Court held that a jury's decision that benefits were not overdue for purposes of MCL 500.3142 precluded the trial court from awarding attorney fees pursuant to MCL 500.3148(1) because a plaintiff is entitled to attorney fees only for overdue benefits. *Id*. at 630.

The Court of Appeals erred by failing to follow the unambiguous language of MCL 500.3142 and MCL 500.3148. In this case, despite instructions from the trial court and on the verdict form, the jury declined to

[12] *Moore*, *supra* at 205-215.

award penalty interest on the $42,755 in unpaid work loss benefits that it awarded plaintiff. From its award of $98.71 in penalty interest, we conclude that the jury found that only one week of work loss benefits was overdue. Therefore, the jury must have found that the $42,755 in work loss benefits was not overdue under the plain meaning of MCL 500.3142 and MCL 500.3148. Because, as noted above, " 'there is an interpretation of the evidence that provides a logical explanation' " for this finding, *Bean*, *supra* at 31, quoting *Granger*, *supra* at 7, we agree with the jury's conclusion that the $42,755 in work loss benefits was not overdue at the time of the trial.

B. UNREASONABLE REFUSAL OR DELAY

MCL 500.3148(1) provides in relevant part, "[t]he attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer *unreasonably refused to pay the claim* or *unreasonably delayed in making proper payment*." The Court of Appeals recognized that an insurer's refusal to pay benefits is not unreasonable " '[i]f the insurer's refusal or delay in payment is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty.' "[13] The Court traced its definition of "unreasonableness" to *Liddell*, *supra* at 650, in which the Court affirmed attorney fees under MCL 500.3148 "on the basis of the refusal of the defendant insurer to reconcile the opinion of one doctor that the plaintiff's injuries from an accident no longer precluded him from employment with the contradictory opinions of the plaintiff's treating physicians."[14] Comparing the facts of this case to the facts of *Liddell*, the

[13] *Moore*, *supra* at 199, quoting *Beach*, *supra* at 629.

[14] *Moore*, *supra* at 200.

Court reasoned, "[h]ere, as in *Liddell*, defendant insurer terminated plaintiff's work loss benefits without attempting to reconcile the opinions of its independent medical examiner and plaintiff's treating physicians." The Court of Appeals concluded, "[u]nder these circumstances, the trial court did not clearly err in finding that defendant unreasonably terminated plaintiff's benefits . . . ."[15]

We reject the Court of Appeals analysis of *Liddell*. In *Liddell*, the Court held that a trial court did not clearly err when it found an insurer's conduct unreasonable where the insurer "did not attempt to contact" physicians with conflicting opinions "or in some other way attempt to ascertain the true situation in the face of contradictory reports."[16] Nothing in the plain language of MCL 500.3148(1), however, requires an insurer to reconcile conflicting medical opinions. Moreover, nothing otherwise implicit in the statute requires an insurer to reconcile competing medical opinions. Therefore, in accordance with the plain language of MCL 500.3148(1), we overrule *Liddell*.

The Court of Appeals erred in affirming the trial court's finding that, because defendant knew that other doctors were involved in plaintiff's case, it was "incumbent upon the carrier to go beyond" defendant's doctor and that the defendant insurer "could have sought further information before exercising the draconian termination of critical benefits for one who is injured."[17] The Court of Appeals misconstrued the plain language of MCL 500.3148(1) and thereby imposed additional duties on insurers beyond those duties already established in Michigan's no-fault insurance statutes. We

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[15] *Id*. at 201.

[16] *Liddell*, *supra* at 651.

[17] *Moore*, *supra* at 200.

acknowledge that the trial court's decision about whether an insurer acted reasonably presents a mixed question of law and fact.[18] We hold that the trial court here erred as a matter of law.

The plain language of MCL 500.3101 *et seq*. does not impose an independent duty on insurers to "go beyond" the medical opinion of their physicians and the IMEs that those physicians perform. Instead, "[t]he determinative factor in our inquiry is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable."[19] To determine whether the initial refusal to pay was unreasonable, the trial court must give effect to the unambiguous language of MCL 500.3148(1). MCL 500.3148(1) requires that the trial court engage in a fact-specific inquiry to determine whether "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

We conclude that an insurer need not resort to a "tie breaker" to resolve conflicting medical reports, but we note that an insurer acts at its own risk in terminating benefits in the face of conflicting medical reports.[20] Here, however, defendant's decision not to seek out another physician to prepare yet another IME in order to reconcile the conflicting opinions of Dr. Walter and Dr. Xeller was not unreasonable under the fact-specific inquiry mandated by MCL 500.3148. MCL 500.3142(2) provides in relevant part: "[i]f reasonable proof is not

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[18] *Ross*, *supra* at 7 ("What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact.").

[19] *Id*. at 11.

[20] *Id*. ("Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.")

supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer." Under the plain language of the statute, the claimant shoulders the initial burden to supply reasonable proof of her entire claim, or reasonable proof for some portion thereof. When the claimant provides such evidence, the insurer then must evaluate that evidence as well as evidence supplied by the insurer's doctor before making a reasonable decision regarding whether to provide the benefits sought.

We reject the trial court's conclusion that the defendant insurer must "go beyond" defendant's doctor or IME. We hold that the Court of Appeals erred in affirming the trial court's ruling that defendant unreasonably terminated plaintiff's benefits. Under the unambiguous language of MCL 500.3148(1) and MCL 500.3142(2), defendant's decision to discontinue plaintiff's benefits in light of a legitimate factual uncertainty was reasonable.

C. ATTORNEY FEES

In *Proudfoot*, *supra* at 485, this Court held that "attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." (Emphasis omitted.) MCL 500.3148(1) provides in relevant part, "[t]he attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

In this case, the jury found that $822.52, or only one week of plaintiff's unpaid work loss benefits, were overdue. Generally, plaintiff's attorney would be entitled to attorney fees incurred to collect those overdue

benefits. Here, however, before plaintiff's suit went to trial, defendant already had paid plaintiff $822.52 for one week of work loss benefits and all other payments that defendant owed as a result of the computer glitch. Because plaintiff did not attribute any of the $79,415 that the trial court awarded her in attorney fees and costs to collecting $822.52 in overdue work loss benefits, plaintiff is not entitled to attorney fees.

Moreover, because, as shown above, defendant did not unreasonably refuse to pay work loss benefits, plaintiff is not entitled to attorney fees incurred to collect the $42,755 awarded by the jury. Our review of the lower court record reveals that plaintiff proffered only one reason that defendant's refusal to pay benefits was unreasonable under MCL 500.3148(1). Specifically, during the hearing on plaintiff's motion for attorney fees, plaintiff's counsel argued that defendant unreasonably discontinued benefits solely because of defendant's reliance on the second IME performed by Dr. Xeller. Related to his broader argument, plaintiff's counsel faulted defendant for not sharing Dr. Xeller's IME with plaintiff's other physicians, not asking plaintiff's other physicians if they agreed with Dr. Xeller's second IME, and not educating themselves about osteoarthritis. To further buttress his argument, plaintiff's counsel relied on *Liddell* for the proposition that defendant must reasonably evaluate plaintiff's medical condition.

As previously discussed, however, defendant's reliance on Dr. Xeller's second IME was not unreasonable under the plain language of MCL 500.3148(1). Forcing defendant to "go beyond" what the unambiguous statutory language mandates would effectively require it to shoulder plaintiff's initial burden pursuant to MCL 500.3142(2). Further, this Court already has concluded

that the Court of Appeals misconstrued *Liddell* and, therefore, that Court's reading of *Liddell* is inapplicable. Moreover, even if we had not overruled *Liddell* and the case were applicable, we note that defendant here did significantly more than the insurer in that case, including requesting two separate IMEs and hiring a nurse case manager to investigate whether plaintiff could return to work.

Because plaintiff did not attribute any of the $79,415 that the trial court awarded her in attorney fees and costs to collecting the $822.52 in overdue work loss benefits as determined by the jury's penalty interest award, and because there is no evidence in the lower court record that defendant's refusal to pay benefits was unreasonable, plaintiff is not entitled to any attorney fees under MCL 500.3148(1).

D. ERRONEOUS STATEMENT OF LAW

The Court of Appeals majority erred by relying on *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97; 527 NW2d 524 (1994), for the proposition that "[i]t is . . . possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them."[21] In actuality, the *McCarthy* Court addressed the inverse proposition, namely, that "the scope of inquiry under [MCL 500.3148] is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable." *McCarthy, supra* at 105. Otherwise stated, an insurer's initial refusal to pay benefits under Michigan's no-fault insurance statutes can be deemed reasonable even though it is later determined that the insurer was required to pay those benefits.

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[21] *Moore*, *supra* at 204, citing *McCarthy*, *supra* at 105.

We recently affirmed the proposition expressed in *McCarthy* that an insurer's initial refusal to pay no-fault benefits can be deemed reasonable even if it is later determined that the insurer was required to pay those benefits. *Ross*, *supra* at 11. This Court's statement in *Ross* and the Court's statement in *McCarthy*, however, do not permit us to assume that the inverse proposition as expressed by the Court of Appeals is similarly correct. Nothing in our jurisprudence suggests that an insurer's initial refusal to pay no-fault insurance benefits can be deemed unreasonable, even though it is later determined that the insurer did not owe those benefits. The Court of Appeals proposition effectively penalizes an insurer for refusing to pay benefits that the insurer had no obligation to pay. In contrast, we conclude that if an insurer does not owe benefits, then benefits cannot be overdue. Therefore, before a court may award attorney fees, benefits must be overdue, and an insurer must have unreasonably refused to pay the claim or delayed in payment.

Accordingly, we reject the Court of Appeals statement that "it is . . . possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them." *Moore*, *supra* at 204.

IV. CONCLUSION

If an insurer's payment does not qualify as overdue, a claimant's attorney may not receive attorney fees under Michigan's no-fault insurance statutes. MCL 500.3101 *et seq*. In this case, the Court of Appeals failed to give effect to the clearly expressed intent of the Legislature in MCL 500.3142 and MCL 500.3148. Because the jury awarded plaintiff only $98.71 in penalty interest and failed to award penalty interest on the $42,755 that it awarded in unpaid work loss benefits,

we conclude that those benefits do not qualify as overdue pursuant to MCL 500.3142(2). Moreover, defendant's act of discontinuing plaintiff's benefits did not constitute either an unreasonable refusal to pay or unreasonable delay under MCL 500.3148(1). Because plaintiff offered no additional reasons to support the unreasonableness of defendant's refusal to pay benefits, plaintiff is not entitled to attorney fees. Finally, we reject the Court of Appeals erroneous statement that an insurer's initial refusal to pay no-fault insurance benefits can be deemed unreasonable even though it is later determined that the insurer was not required to pay those benefits.

Accordingly, we reverse the Court of Appeals and remand for further proceedings consistent with our opinion.

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

CAVANAGH, J., did not participate because of a familial relationship with counsel for Secura Insurance.

KELLY, J. (*dissenting*). I dissent from the majority opinion reversing the Court of Appeals judgment. I would hold that the Court of Appeals correctly analyzed the issues involved. I also believe that the majority opinion improperly substitutes its judgment for that of the trial court and ignores the deferential standards of review applicable here. I would therefore uphold the trial court's award of attorney fees and its determination that defendant's behavior was unreasonable. Finally, I would not overrule *Liddell v Detroit Automobile Inter-Ins Exch*.[1]

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[1] *Liddell v Detroit Automobile Inter-Ins Exch*, 102 Mich App 636; 302 NW2d 260 (1981).

FACTS AND PROCEDURAL HISTORY

In September 2000, plaintiff Hattie Moore's automobile was struck while she was driving on I-475 in Genesee County. Plaintiff's right knee was fractured in the accident. She was unable to return to her custodial job. Defendant, plaintiff's no-fault insurer, began paying her work loss benefits and other no-fault benefits in December 2000.

Both before and after the accident, plaintiff received treatment from an orthopedic surgeon, Dr. Norman Walter. She had originally sought treatment from Dr. Walter for osteoarthritis in both knees. Following the accident, Dr. Walter recommended surgery on plaintiff's right knee to repair the injury caused by the accident. At defendant's request, Dr. Charles Xeller, also an orthopedic surgeon, also examined plaintiff. Dr. Xeller, in his independent medical examination (IME), agreed with the need for surgery. Dr. Walter operated on plaintiff's right knee on January 26, 2001.

Plaintiff remained unable to return to work after the surgery and continued to treat with Dr. Walter. Defendant meanwhile retained Dan Schingeck, a nurse case manager, to explore whether plaintiff could return to work. Schingeck met with Dr. Walter in August 2001. Some time after that meeting, Dr. Walter expressed his opinion that plaintiff would never be able to return to her normal employment. It is unclear, however, whether Dr. Walter formed that opinion because of the injuries plaintiff suffered in the automobile accident or because of plaintiff's osteoarthritis.

Dr. Xeller performed a second IME of plaintiff at defendant's request on September 25, 2001. This report stated that plaintiff no longer required any treatment for her orthopedic injuries sustained in the accident. The report further concluded that plaintiff had signifi-

cant osteoarthritic deterioration in both knees that had not been exacerbated by the accident. Dr. Xeller opined that plaintiff could return to restricted work activities.

On the basis of Dr. Xeller's second IME, defendant terminated plaintiff's no-fault benefits. Plaintiff then filed a lawsuit seeking first-party no-fault benefits. Plaintiff later added a second lawsuit seeking uninsured motorist benefits from defendant. The cases were tried together before a jury, in June 2005.

The jury awarded plaintiff $42,755 in work loss benefits, $98.71 in penalty interest, and $50,000 in noneconomic losses related to plaintiff's uninsured motorist claim. After judgment was entered, plaintiff filed a motion for attorney fees and costs under MCL 500.3148(1). The trial judge heard oral argument on the motion and ultimately granted it. Following a hearing before another judge, plaintiff was awarded $79,415 in attorney fees and costs.

Defendant appealed only the award of attorney fees and costs. The Court of Appeals affirmed in a divided opinion,[2] and defendant sought leave to appeal in this Court. We scheduled oral argument on the application.[3]

ANALYSIS

A. OVERDUE BENEFITS

Under MCL 500.3148(1), attorney fees may be awarded only (1) "in an action for personal or property protection insurance benefits which are overdue" and (2) when the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." The jury's finding that benefits were "overdue"

[2] *Moore v Secura Ins*, 276 Mich App 195; 741 NW2d 38 (2007).

[3] *Moore v Secura Ins*, 482 Mich 883 (2008).

will be upheld if "there is an interpretation of the evidence that provides a logical explanation for the findings of the jury."[4] In this case, the majority upholds the jury's finding that some benefits were overdue. However, it then extrapolates from the amount of penalty interest awarded that "the jury declined to award penalty interest on the $42,755 in unpaid work loss benefits that it awarded plaintiff."[5]

Instead, the majority concludes that the jury found "only one week of work loss benefits was overdue."[6] The majority then opines (1) that the jury attributed this overdue week of work loss benefits to benefits paid late by defendant to plaintiff before trial to a computer glitch, and (2) "that the $42,755 in work loss benefits was not overdue at the time of the trial."[7] Therefore, the majority asserts that "the $42,755 in work loss benefits was not overdue under the plain meaning of MCL 500.3142 and MCL 500.3148."[8]

The majority cannot claim to have insight into the minds of the jurors in this case. Any analysis of the jury's conclusions must be based on the record.

With that in mind, it should be noted that, the majority fails to reference the parts of the jury verdict form where the jury was specifically asked these questions:

> QUESTION NO. 1: Did Hattie Moore sustain work loss arising out of the accidental bodily injury she sustained in the September 27, 2000 motor vehicle accident?

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[4] *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987).

[5] *Ante* at 519-520.

[6] *Ante* at 519.

[7] *Ante* at 518, 520. Because the majority makes this logical leap on the basis of speculation about the jury's conclusions, I reject it from the outset.

[8] *Ante* at 520.

(Work loss consists of loss of income from work the plaintiff would have performed during the first three years after the date of the accident if the plaintiff had not been injured. Work-loss benefits are computed at 85 percent of the plaintiff's loss of gross income, but they may not exceed the sum of $3,898.00 per 30-day period from October 1, 2000 — September 30, 2001, and, $4,027 per 30-day period from October 1, 2001 — September 30, 2002, and, $4,070 per 30-day period from October 1, 2002 — September 30, 2002 [sic], nor may they be payable beyond three years after the date of the accidental bodily injury.)

A. Answer: Y (yes or no)

B. If your answer is "yes," what is the amount of work loss owed to Hattie Moore (include only work loss not already paid by defendant)?

Answer: $ 42 K.
755

* * *

QUESTION NO. 3: Was payment for any of the expenses or losses to which the [sic] Hattie Moore was entitled overdue?

(Payment for an expense or loss is overdue if it is not paid within 30 days after the defendant receives reasonable proof of the fact and the amount of the claim. An overdue claim bears interest at the rate of 12 percent per annum from the date the expense or loss becomes overdue.)

A. Answer: Y (yes or no)

B. If your answer is "yes," what is the amount of interest owed to Hattie Moore on overdue benefits (include only interest not already paid by the defendant)?

Answer: $ 98.00

The jury verdict form provides an answer to the first inquiry: was payment to which the plaintiff was entitled overdue? The jury answered yes. Therefore, contrary to the majority's conclusion, the verdict establishes that

this lawsuit was "an action for personal or property protection insurance benefits which are overdue."

Defendant is correct that over $11,000 in penalty interest would have been the appropriate amount of penalty interest had the jury found the entire $42,755 in benefits overdue. Again, however, I would decline to speculate about the reasons for the size of the jury's award. As the Court of Appeals majority noted, plaintiff filed an "applications of benefits" form with defendant in December 2000 and plaintiff's employer provided employment information indicating plaintiff's wage history. A reasonable jury may have found that those proofs established that some portion of work loss benefits was overdue.[9]

I acknowledge that the majority identifies a logical explanation for the amount of the penalty interest award. Nonetheless, the majority reaches this conclusion by speculating about the jury's rationale for awarding a dollar amount that neither party suggested was correct. Unlike the majority, I decline to substitute my judgment for that of the jury, which definitively found that some payment to plaintiff was "overdue."[10]

Finally, the majority's citation of *Beach v State Farm Mut Automobile Ins Co*[11] as consistent with its decision here is misplaced. In *Beach*, the jury awarded no penalty interest to the plaintiff. The trial court right-

[9] Oddly, the majority asserts that it is "uphold[ing]" the jury's verdict. But, contrary to the majority's assertion, nowhere in the record is it apparent that "the jury decided that only one week of work loss benefits was overdue." *Ante* at 519. Rather, the majority arrives at this conclusion only after a series of speculative remarks about what the jury "may have concluded" in arriving at its verdict.

[10] As the Court of Appeals majority noted, "[t]he jury is the finder of fact, and we will not second-guess it." *Moore*, *supra* at 202.

[11] *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612; 550 NW2d 580 (1996).

fully concluded that, given that penalty interest was not awarded, the jury must have concluded that the no-fault benefits at issue were not overdue. Also, attorney fees could not be awarded.

Beach is easily distinguishable, as plaintiff noted in her brief, because the Court in *Beach* had no need to speculate about how or why the jury had awarded penalty interest. The jury in *Beach* awarded no penalty interest, precluding both a finding that benefits were overdue and an award of attorney fees. In this case, conversely, the majority notes the amount of penalty interest awarded, then makes a series of guesses about the jury's intent. I would adhere to the clear answer on the jury verdict form: the jury concluded that benefits were overdue.

B. UNREASONABLE REFUSAL OR DELAY

An insurer's refusal to pay benefits is not unreasonable when it is "the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty."[12] The trial court's application of that standard to the particular facts of the case is reviewed for clear error.[13] The majority concludes that defendant's refusal to pay benefits in this case was the product of a legitimate factual uncertainty and therefore was reasonable. In the process, the majority overrules *Liddell*, *supra*. In *Liddell*, the Court of Appeals upheld the trial court's determination that an insurer acted unreasonably because it did not attempt to contact physicians with conflicting opinions or reconcile contradictory medical reports.[14]

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[12] *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987).

[13] *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

[14] "The testimony . . . indicated that defendant did not attempt to contact these physicians or in some other way attempt to ascertain the true situation in face of the contradictory reports." *Liddell*, *supra* at 651.

I disagree with the majority and would not overrule *Liddell*. Moreover, I cannot agree with the majority's conclusion that the trial court erred as a matter of law in concluding that defendant's refusal to pay benefits to plaintiff was unreasonable.

In this case, I believe that it was certainly possible that the trial judge determined that no bona fide factual uncertainty existed. Ample evidence exists on the record to support this conclusion. First, defendant did not even attempt to reconcile the competing medical opinions of the IME and plaintiff's doctors. More importantly, defendant did not provide plaintiff's doctors with the results of the IME that conflicted with their medical opinions.

The majority's declaration that the "plain meaning" of MCL 500.3142(2)[15] and MCL 500.3148(1)[16] provides a

[15] MCL 500.3142 provides:

(1) Personal protection insurance benefits are payable as loss accrues.

(2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(3) An overdue payment bears simple interest at the rate of 12% per annum.

[16] MCL 500.3148 provides, in relevant part:

(1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protec-

basis for overruling *Liddell* is unavailing. As is apparent from the text of these statutes, they are entirely silent on the circumstances here, where the parties have conflicting medical opinions.[17]

Notably, the statute requires only "reasonable proof" of the plaintiff's claim and the amount of loss sustained in order to make unpaid benefits overdue. Contrary to the majority, I submit that, under the plain meaning of "reasonable proof," the medical opinion of plaintiff's doctor meets that standard.

A lay dictionary defines "reasonable" as "agreeable to or in accord with reason; logical."[18] "Proof" is defined as "1. evidence sufficient to establish a thing as true or believable. . . . 5. (in judicial proceedings) evidence that seems to substantiate or corroborate a charge or allegation."[19]

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tion insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

[17] The majority rejects *Liddell* because "[n]othing in the plain language of MCL 500.3148(1) . . . requires an insurer to reconcile conflicting medical opinions." *Ante* at 521. This argument makes little sense given that no language in either MCL 500.3142 or 500.3148(1) requires an insurer to do anything other than pay benefits within 30 days of proof from the claimant. Otherwise, the benefits are deemed "overdue" and the insurer is liable for attorney fees under § 3148(1). Aside from the term "reasonable proof," nothing in either statute discusses evidentiary burdens, offers any guidance for what constitutes "reasonable proof," or provides any edification on the issues before us in this case. In fact, it is the majority that writes words into the statute by requiring claimants to provide more than "reasonable proof" when there is conflicting evidence regarding the cause of claimant's injuries. This outcome is startling given the majority's oft-repeated mantra that unambiguous statutes must be enforced as written. See, e.g., *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[18] *Random House Webster's College Dictionary* (2001).

[19] *Id.*

In this case, it was not clearly erroneous for the trial judge to conclude that the medical opinion of plaintiff's doctor was sufficiently "logical" to establish plaintiff's claim "as true or believable." Therefore, the trial judge's finding that defendant's refusal to pay benefits was unreasonable under MCL 500.3142(2) does not constitute clear error.

However, even if, after defendant's doctor performed the IME that yielded a conflicting conclusion, plaintiff's doctor's opinion no longer sufficed as "reasonable proof" of plaintiff's claim, defendant may not immediately terminate benefits. Rather, an insurer that does not attempt to reconcile credible conflicting medical opinions before terminating benefits acts unreasonably.[20]

At the least, defendant in this case should have alerted plaintiff's treating physicians of the new contradictory opinion. This would have allowed plaintiff an opportunity to submit additional proof to satisfy the "reasonable proof" threshold in MCL 500.3142(2). In my view, an insurer should not be able to create a bona fide factual uncertainty by choosing to reject plaintiff's doctor's credible opinion and rely solely on its doctor's "independent medical report." To allow insurers to terminate benefits on this basis alone contradicts the requirement that the factual uncertainty be "bona fide."

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[20] I recognize that the majority criticizes this view for supposedly "impos[ing] additional duties on insurers beyond those duties already established in Michigan's no-fault insurance statutes." *Ante* at 521. However, as stated previously, I believe this requirement is consistent with the plain meaning of "reasonable proof." Moreover, I note that in practice, this requirement puts insurers on notice that immediately terminating benefits in the face of contradictory medical information, without any further action, is probably "unreasonable." By contrast, the majority's rule does not impose such a requirement but leaves an insurer to "act[] at its own risk in terminating benefits in the face of conflicting medical reports." *Ante* at 522. It seems to me that the majority's analysis leaves insurers twisting in the wind.

I further conclude that, even if *Liddell* is overruled, I would reach the same result because defendant "unreasonably delayed in making proper payment" under MCL 500.3148(1). I would so hold because defendant failed to pay plaintiff monies it knew were owed considering the computer glitch that had delayed payment.

Defendant conceded that the payment covering December 2000 to March 2001 was overdue and that it "admittedly owed" plaintiff 12 percent penalty interest for that late payment under MCL 500.3142(3). Defendant's failure to pay penalty interest that it acknowledged was owed to plaintiff constitutes an unreasonable delay in making "proper payment" under MCL 500.3148(1). Nothing in the statutory language restricts "proper payment" to overdue benefits.

The Legislature's decision to allow attorney fee awards where "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment" demonstrates a preference that plaintiffs recover attorney fees in the following circumstances: (1) if insurers unreasonably refuse to pay a claim at all, (2) if they unreasonably delay in paying the claim, or (3) if they unreasonably delay in paying the proper amount of the claim. Here, because defendant conceded that the penalty interest was owed on the overdue payment, it was unreasonable for it not to pay plaintiff the proper amount of that claim. The proper amount was the overdue benefits plus the 12 percent penalty interest.

I therefore conclude that the trial judge did not clearly err by holding that defendant's refusal to pay benefits was unreasonable.

C. ATTORNEY FEES

Because I believe that the trial court did not clearly err by concluding that (1) some benefits were overdue

and (2) defendant's refusal to pay the claim was unreasonable, I further conclude that the trial court did not abuse its discretion in awarding plaintiff $79,415 in attorney fees. I also see no merit in defendant's argument that, even if plaintiff is entitled to attorney fees, she may recover only the portion directly attributable to securing overdue benefits.

In *Cole v Detroit Automobile Inter-Ins Exch*,[21] the defendant asserted that the trial court should have based its claim for attorney fees on the portion of time the attorney expended in pursuit of the unreasonably denied claim. The Court of Appeals rejected this position. Defendant here rejects *Cole* and relies on *Proudfoot v State Farm Mut Ins Co*[22] arguing that *Proudfoot* supports its argument and effectively overruled *Cole*.

This Court in *Proudfoot* reversed an award of attorney fees for benefits that were not yet overdue because they had not yet been incurred. Defendant argues that the Court of Appeals in this case incorrectly distinguished *Proudfoot* because the benefits at issue there had not yet been incurred, whereas the benefits at issue here were incurred.

However, as the Court of Appeals majority in this case held, there is no support for defendant's position in the plain language of the statute. The critical inquiry when determining whether attorney fees may be awarded is whether the plaintiff is maintaining "an action for personal or property protection insurance benefits which are overdue."[23]

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[21] *Cole v Detroit Automobile Inter-Ins Exch*, 137 Mich App 603, 613-614; 357 NW2d 898 (1984).

[22] *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476; 673 NW2d 739 (2003).

[23] MCL 500.3148(1).

If at least some of the benefits are found to be overdue, the lawsuit constitutes "an action for personal or property insurance benefits which are overdue" under MCL 500.3148(1). Under these circumstances, a plaintiff is entitled to an award of attorney fees. Here, the trial judge's award of the entire amount of attorney fees requested by plaintiff was not outside the range of principled outcomes because the jury found that benefits were overdue. Thus, the trial judge did not abuse his discretion.

D. PUBLIC POLICY AND THE NO-FAULT ACT

Finally, I note that my dissent is consistent with the purpose of the no-fault act.[24] The majority's opinion, by contrast, undermines the Legislature's intent of providing injured parties adequate and prompt reparation from insurers. I fear that the majority opinion provides further opportunity for insurers to abruptly deny claims by holding plaintiffs to a higher standard than the "reasonable proof" requirement of MCL 500.3142(2).

CONCLUSION

I dissent from the majority's decision to reverse the trial court's award of attorney fees to plaintiff. The Court of Appeals decision should be affirmed.

WEAVER, J., concurred with KELLY, J.

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[24] See, e.g., *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978), which observed that the "goal of the no-fault insurance system [is] to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses."

PEOPLE v MILLER

Docket No. 135989. Argued October 2, 2008 (Calendar No. 7). Decided December 30, 2008.

An Ottawa Circuit Court jury convicted Michael A. Miller of first-degree criminal sexual conduct. Before sentencing, the defendant learned that one of the jurors had concealed his prior convictions of offenses similar to the defendant's offense. The defendant moved for a new trial. The court, Calvin L. Bosman, J., held an evidentiary hearing, at which the juror testified, and denied the motion, finding no evidence that the defendant had suffered actual prejudice by the presence of a convicted felon on his jury. The Court of Appeals, DAVIS, P.J., and MURPHY and WHITE, JJ., reversed the defendant's conviction in an unpublished opinion per curiam, issued January 17, 2008 (Docket No. 273488), and remanded the case for a new trial because of juror misconduct. The prosecution applied for leave to appeal, which the Supreme Court granted. 481 Mich 851 (2008).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justices WEAVER, CORRIGAN, and YOUNG, the Supreme Court *held*:

A violation of MCL 600.1307a(1)(e), which prohibits a convicted felon from serving on a jury, requires a new trial only if the violation actually prejudiced the defendant.

1. While a criminal defendant has a constitutional right to be tried by an impartial jury, the defendant does not have a constitutional right to be tried by a jury free of convicted felons.

2. A juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an impartial jury. The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt.

3. The defendant's only complaint about the juror is that he is a convicted felon. The defendant offered no evidence that the juror was not impartial. A juror's mere status as a convicted felon is not sufficient to rebut the presumption of impartiality. The trial court did not clearly err by ruling that the defendant failed to demon-

strate actual prejudice by the convicted felon's presence on his jury and did not abuse its discretion by denying the defendant's motion for a new trial.

4. The presence of a convicted felon on the defendant's jury did not constitute structural error, which is a fundamental constitutional error that defies analysis under the harmless-error standard of review.

Reversed and remanded to the Court of Appeals for consideration of the defendant's remaining issues.

Justice KELLY, dissenting, would affirm the Court of Appeals because it correctly concluded that the presence of a convicted felon on the defendant's jury caused prejudice under MCL 600.1354(1), requiring a new trial under *People v DeHaven*, 321 Mich 327 (1948), and its progeny.

Justice CAVANAGH concurred with Justice KELLY's result.

JURY — JUROR QUALIFICATIONS — CONVICTED FELONS SERVING AS JURORS — IMPARTIAL JURORS — NEW TRIAL.

A violation of the statute prohibiting a convicted felon from serving on a jury requires a new trial only if the violation actually prejudiced the defendant; the juror's failure to disclose a felony conviction is only prejudicial if it denied the defendant an impartial jury; the defendant has the burden of establishing that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt (MCL 600.1307a[1][e], 600.1354[1]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Assistant Prosecuting Attorney, for the people.

Gary L. Kohut for the defendant.

Amici Curiae:

Kym L. Worthy, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the Wayne County Prosecutor's Office.

Charles H. Koop, *Jeffrey L. Sauter*, and *William W. Worden* for the Prosecuting Attorneys Association of Michigan.

MARKMAN, J. We granted leave to appeal to consider whether defendant is entitled to a new trial on the basis that a convicted felon served as a juror in his original trial. The trial court held that defendant is not entitled to a new trial because he failed to establish actual prejudice. The Court of Appeals, on the other hand, held that defendant is entitled to a new trial because the presence of the convicted felon on his jury did prejudice him. We do not believe that the trial court abused its discretion in denying defendant's motion for a new trial under these circumstances because the trial court did not clearly err in concluding that defendant failed to establish that he was actually prejudiced. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for it to address defendant's remaining issues.

I. FACTS AND PROCEDURAL HISTORY

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct for forcing his then-girlfriend's seven-year-old daughter to perform fellatio on him. Before sentencing, defendant learned that one of the jurors had concealed the fact that he had been convicted of assault with intent to commit criminal sexual conduct in 1991 and 1999 for having assaulted his sister and another person to whom he referred as an "adopted child" who was "more like a niece." An evidentiary hearing was held. The juror in question stated that he did not reveal his prior convictions on his juror questionnaire because they were old and he did not believe that they were even on his record anymore.[1] He further stated that because he had pleaded guilty in both of his criminal cases, he had

[1] The juror questionnaire asked, "Have you ever been a victim, witness, plaintiff or defendant in a criminal or civil suit?" It also asked, "Have you ever been convicted of a felony?" The juror answered "no" to both questions.

never before been through a jury selection process. When asked whether he had been intentionally untruthful so that he could sit as a juror, he answered, "no," and he indicated that he "didn't really want to sit on the panel in the first place . . . ." The juror further testified that he had tried to be fair during the trial and that he never tried to improperly persuade the jury. Following this testimony, the trial court denied defendant's motion for a new trial, ruling that there was no evidence that defendant had suffered actual prejudice.[2] The trial court explained that if the parties had known about the juror's past convictions, the prosecutor, not the defendant, would have most likely been the one seeking to excuse this juror. On appeal, the Court of Appeals reversed defendant's conviction and remanded for a new trial on the basis of juror misconduct.[3]

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[2] During voir dire, defense counsel asked whether jurors had any family member or friend who was a lawyer, a judge, or anyone involved in the criminal justice system, such as a jail guard or prison guard. Because the juror did not believe that he fit into any of those categories, he did not answer the question affirmatively. During voir dire, the prosecutor asked whether jurors "had personal dealings with criminal sexual conduct in [their] immediate, close family to where—to the point where they think they can't be fair in this kind of trial." The juror did not answer this question affirmatively because he believed that he could be fair. The trial court determined that although the juror answered the questions on the juror questionnaire untruthfully, he did not answer any of the voir dire questions untruthfully given the examples and the qualifiers that were used by the attorneys in the potentially applicable questions. The trial court further concluded that the juror was not attempting to be deceitful and that he did not have any ulterior motives in answering the questions in the manner that he did.

[3] The Court of Appeals agreed with the trial court that

> [w]hile the juror clearly misrepresented his status on the questionnaire with regard to criminal history, . . . the questions during voir dire, as framed and qualified, did not technically require the juror to divulge his past convictions, so it cannot be said that the juror lied or made a misrepresentation during voir dire. [Unpublished opinion per curiam, issued January 17, 2008 (Docket No. 2734888), p 2.]

Unpublished opinion per curiam, issued January 17, 2008 (Docket No. 273488). We granted the prosecutor's application for leave to appeal and limited the issues to:

> (1) whether the Court of Appeals erred in reversing the defendant's conviction and remanding this case to the circuit court for a new trial pursuant to *People v DeHaven*, 321 Mich 327 (1948); (2) whether *DeHaven* was wrongly decided or has been superseded by MCL 600.1354(1); (3) whether a criminal defendant must establish actual prejudice pursuant to MCL 600.1354(1) where the challenged juror was excusable for cause; (4) how the "actual prejudice" standard for purposes of MCL 600.1354(1) should be defined; and (5) whether the juror's failure to disclose his status as a felon, which disqualified him from serving on the jury, constituted structural error pursuant to *Neder v United States*, 527 US 1 (1999). [481 Mich 851, 851-852 (2008).]

II. STANDARD OF REVIEW

A trial court's factual findings are reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *Cress*, 468 Mich at 691. An abuse of discretion occurs only "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

III. ANALYSIS

There are several statutory qualifications that a person must satisfy in order to be eligible to serve as a juror. MCL 600.1307a(1) provides:

> To qualify as a juror a person shall:

(a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the person is selected, and in the case of a district court in districts of the second and third class, be a resident of the district.

(b) Be able to communicate in the English language.

(c) Be physically and mentally able to carry out the functions of a juror. Temporary inability shall not be considered a disqualification.

(d) Not have served as a petit or grand juror in a court of record during the preceding 12 months.

(e) *Not have been convicted of a felony.* [Emphasis added.]

If a potential juror does not satisfy one of these statutory qualifications, a party may challenge the potential juror for cause. MCR 2.511(D)(1). There are also several other grounds that would justify a challenge for cause. MCR 2.511(D) provides, in pertinent part:

It is grounds for a challenge for cause that the person:

(1) *is not qualified to be a juror*;

(2) is biased for or against a party or attorney;

(3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;

(4) has opinions or conscientious scruples that would improperly influence the person's verdict;

(5) has been subpoenaed as a witness in the action;

(6) has already sat on a trial of the same issue;

(7) has served as a grand or petit juror in a criminal case based on the same transaction;

(8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;

(9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;

> (10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;
>
> (11) has a financial interest other than that of a taxpayer in the outcome of the action;
>
> (12) is interested in a question like the issue to be tried. [Emphasis added.]

MCR 6.412(D)(2) provides that if "the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel." Similarly, MCL 600.1337 states that "[w]hen the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, or is exempt and claims an exemption, the court shall discharge him or her from further attendance and service as a juror." Finally, MCL 600.1354(1) states, in pertinent part:

> Failure to comply with the provisions of this chapter shall not . . . affect the validity of a jury verdict unless the party . . . claiming invalidity has made timely objection and unless the party demonstrates *actual prejudice* to his cause and unless the noncompliance is substantial. [Emphasis added.]

In the instant case, because the juror in question was a convicted felon, he was not statutorily qualified to serve as a juror under MCL 600.1307a(1)(e). However, as a result of the juror's false answers on his juror questionnaire, neither of the parties nor the trial court had any knowledge of the juror's felony convictions, and, thus, the parties did not challenge the juror pursuant to MCR 2.511(D)(1) and the trial court did not discharge the juror pursuant to MCL 600.1337 and MCR 6.412(D)(2). Accordingly, the issue here is whether defendant is entitled to a new trial as a result of this convicted felon having served on his jury.

Although a criminal defendant has a constitutional right to be tried by an impartial jury, US Const, Am VI;[4] Const 1963, art 1, § 20,[5] a criminal defendant does not have a constitutional right to be tried by a jury free of convicted felons.[6] Instead, the right to a jury free of

[4] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." US Const, Am VI.

[5] "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury . . . ." Const 1963, art 1, § 20.

[6] In *United States v Uribe,* 890 F2d 554, 562 (CA 1, 1989), the United States Court of Appeals for the First Circuit held that a "statutory violation—allowing a convicted felon to serve—did not implicate the fundamental fairness of the trial or the defendants' constitutional rights." "The fact that a juror technically should have been disqualified, and was not, does not automatically require a new trial." *Id.* Instead, under such circumstances, the defendant is required to prove prejudice. *Id.*; see also 47 Am Jur 2d, Jury, § 152, p 759 ("The Sixth Amendment does not require automatic reversal of every conviction reached by a jury that included a felon."); Anno: *Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense*, 75 ALR5th 295, 310, § 3[b] (stating that several courts have "held that the constitutional right to a fair and impartial jury was not violated by the . . . failure to exclude convicted felons"); *United States v Barker,* 1999 US App LEXIS 9459, *3 (CA 4, 1999) ("Although convicted felons are statutorily excluded from jury service, a criminal defendant does not have a corresponding constitutional right to have convicted felons absolutely barred from serving on his jury. The Sixth Amendment only requires that the jury be free from bias.") (citation omitted); *Coleman v Calderon*, 150 F3d 1105, 1117 (CA 9, 1998) ("The Sixth Amendment does not bar ex-felons from jury service."), overruled on other grounds 525 US 141 (1998); *Coughlin v Tailhook Ass'n,* 112 F3d 1052, 1059 (CA 9, 1997) ("[T]he participation of a felon-juror is not an automatic basis for a new trial."); *United States v Boney,* 314 US App DC 287, 289; 68 F3d 497 (1995) ("[T]he Sixth Amendment does not absolutely bar felon-jurors. Rather, the appropriate remedy for an allegation of juror bias is to hold an evidentiary hearing in order to determine whether the juror's failure to disclose his felon status resulted in 'actual bias' to the defendant.") (citation omitted); *United States v Humphreys,* 982 F2d 254, 261 n 5 (CA 8, 1992) (" 'The Sixth Amendment right to an impartial jury does not require an absolute bar on felon-jurors.' ") (citation omitted). The fact that before MCL 600.1307a(1)(e) was amended in 2002, convicted felons who had already

convicted felons is granted by statute. And by statute, a violation of this "right" only requires a new trial if the defendant demonstrates that such a violation "actual[ly] prejudice[d]" him. MCL 600.1354(1).[7]

A juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an impartial jury.[8] "[Defendants] are not

served their sentences were qualified to serve as jurors underscores that the "right" to a jury free of convicted felons is not a constitutional right.

[7] At oral argument before this Court, defense counsel argued that defendant was denied his right to a 12-member jury, see Const 1963, art 1, § 20; MCR 6.410(A), because the convicted felon was not qualified to serve as a juror. First, this issue is unpreserved, as defendant did not raise it until oral argument before this Court. Second, defendant fails to recognize that although MCL 600.1307a(1)(e) provides that a convicted felon is not qualified to serve as a juror, MCL 600.1354(1) provides that a violation of this rule "shall not . . . affect the validity of a jury verdict unless the party . . . claiming the invalidity . . . demonstrates actual prejudice . . . ." The Legislature was free to decide to either allow or not allow convicted felons to serve as jurors. Accordingly, it was likewise free to allow a jury verdict obtained from a jury that included a convicted felon to not be automatically invalidated. That is, the Legislature was free to provide, as it did, that a 12-member jury that includes a convicted felon is nevertheless a 12-member jury. Furthermore, if the defendant were correct that every conviction that was obtained from a jury with an unqualified juror on it had to be reversed, all jury verdicts would be second-guessed. That is, every jury verdict in the state of Michigan would be contingent upon a court subsequently determining that none of the jurors who sat on the jury was statutorily disqualified for one reason or another.

[8] Contrary to the dissent, we *do* "address how the 'actual prejudice' standard for purposes of [MCL 600.1354(1)] should be defined." *Post* at 576. To repeat, a juror's failure to disclose information that the juror should have disclosed constitutes "actual prejudice" if it denied the defendant an impartial jury. Although we recognize that it may be difficult, although not impossible, for a defendant to establish that he was "actually prejudiced," the Legislature could not have been clearer that a defendant is not entitled to a new trial unless the defendant "demonstrates actual prejudice to his cause . . . ." MCL 600.1354(1). Unlike the dissent, we are simply unwilling to disregard this clear directive from the Legislature.

entitled to a new trial unless the juror's failure to disclose denied [the defendants] their right to an impartial jury." *McDonough Power Equip, Inc v Greenwood,* 464 US 548, 549; 104 S Ct 845; 78 L Ed 2d 663 (1984). " 'The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had . . . .' " *People v Nick,* 360 Mich 219, 230; 103 NW2d 435 (1960), quoting 39 Am Jur, New Trial, § 70, p 85.[9]

In *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 135; 523 NW2d 849 (1994), the Court of Appeals held that actual prejudice was established because the juror at issue had deliberately misrepresented her criminal history on the juror questionnaire and had previously hired an assassin to kill a drug informant who had agreed to testify against the juror's ex-husband (a notorious drug kingpin). However, the Court of Appeals "caution[ed] that our opinion is not to stand for the proposition that prejudice will always be found when a convicted felon makes a misrepresentation on a juror questionnaire or at voir dire." *Id.* The Court of Appeals clearly indicated that its bases for finding actual prejudice were the juror's *deliberate* misrepresentation and the nature of the juror's criminal history, i.e., she hired an assassin to kill a potential witness. *Id.*[10]

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[9] When information that affects a juror's qualifications to sit as a juror is discovered after the trial, "most states . . . require a showing of juror bias" before they will grant the defendant a new trial. Note, *When jurors lie: differing standards for new trials,* 22 Am J Crim L 733, 737 (1995).

[10] The instant case is obviously distinguishable from *Froede*. Unlike the juror in *Froede,* the juror here did not deliberately misrepresent his criminal history. Rather, the trial court stated, "I don't find that he was attempting to be deceitful or that he had any ulterior motive in answering these questions that way," and we have no reason to believe that the trial court clearly erred in making such a finding. In addition, unlike the juror in *Froede,* the juror here had never been convicted of any crimes involving tampering with the administration of justice.

In *People v Carey*, 110 Mich App 187, 193; 312 NW2d 205 (1981), the Court of Appeals held that the trial court did not err in failing to declare a mistrial when it was discovered shortly after deliberations had begun that one of the jurors was a convicted felon, in part because defendant did not demonstrate that he had been actually prejudiced. In reaching this conclusion, the Court of Appeals relied on the fact that the "juror testified that his convictions would not affect his ability to render an impartial verdict." *Id.*[11]

As we explained earlier, defendants have a constitutional right to an impartial jury. However, as Justice COOLEY, writing for this Court, explained, jurors are "presumed to be . . . impartial, until the contrary is shown." *Holt v People*, 13 Mich 224, 228 (1865). The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt. *Id.*[12]

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[11] Likewise, in *People v Johnson,* 245 Mich App 243; 631 NW2d 1 (2001), the Court of Appeals affirmed the defendant's domestic violence conviction. The defendant was not entitled to a new trial even though one of the jurors was a complainant in a domestic violence prosecution, in part because the defendant had not demonstrated that he was actually prejudiced. In the lead opinion, Judge O'CONNELL explained that, "[o]n the basis of the juror's assurances [that she could be fair and impartial], and the trial court's acceptance of her assurances, we see no reasonable probability that the outcome of the case would have been different." *Id.* at 259-260 (opinion by O'CONNELL, J.).

[12] The pertinent paragraph from *Holt,* 13 Mich at 228, states:

> [I]t must be borne in mind that a person called as a juror is presumed to be qualified and impartial, until the contrary is shown. The challenging party takes upon himself the burden of proving the disqualification, and he does not relieve himself of that burden until he has made out a *prima facie* case, or, in criminal cases, such a case, at the least, as leaves the juror's impartiality in reasonable doubt. It is not sufficient for him to prove facts, from which vague inferences of bias or favor can be drawn, and then

In *Nick,* the defendant argued that he was entitled to a new trial because one of the jurors had failed to disclose the fact that her father was an attorney practicing in the area and defense counsel had made some reference to her father during the trial. This Court held that the defendant was not entitled to a new trial because he had not established that the juror was not impartial. *Nick,* 360 Mich at 234. As this Court explained:

> "[I]t is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury . . . . A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial . . . . The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had . . . ." [*Id.* at 230, quoting 39 Am Jur, New Trial, § 70, p 85.][13]

> demand that his adversary shall be concluded unless he rebuts those inferences by countervailing testimony.

Holt predated the enumeration of statutory disqualifications now contained in MCL 600.1307a. The issue in *Holt* was whether the defendant was denied his right to an impartial jury. Accordingly, *Holt*'s discussion of juror "disqualification" was clearly not in reference to the statutory juror disqualifications at issue in the instant case, but, rather, was in reference to a juror's ability to remain impartial. Contrary to the dissent, *Holt* very clearly states that the burden is on the defendant to prove that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt. *Id.* Although the dissent concludes that "*Holt* requires less than actual bias," *post* at 576 n 45, it fails to explain how a defendant is to place the juror's impartiality in reasonable doubt without offering evidence in support of that proposition.

[13] Similarly, the United States Supreme Court has held:

> [T]o obtain a new trial . . . , a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have pro-

In the instant case, defendant's only complaint about the juror at issue in this case is that he is a convicted felon.[14] However, defendant has offered no evidence that the juror was not impartial. In *Holt,* 13 Mich at 229, the Court concluded that the juror's own admission that he had formed a partial opinion regarding the defendant's guilt before the trial even began was not

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> vided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's *impartiality* can truly be said to affect the fairness of a trial. [*McDonough,* 464 US at 556 (second italics added).]

Although the federal standard requires a new trial if a "correct response would have provided a valid basis for a challenge for cause," this is because of the fact that there is no federal rule listing specific grounds for challenges for cause; instead, challenges for cause are only permitted upon a showing that the juror is not capable of being impartial. Because Michigan's rule *does* list grounds for challenges for cause, and because one of these grounds is that the juror is not qualified to sit as a juror (which qualifications do not pertain to a juror's capability of being impartial), our standard to obtain a new trial does not focus on whether a "correct response would have provided a valid basis for a challenge for cause," but, instead, focuses on whether the juror was impartial. As the United States Supreme Court has explained, "[defendants] are not entitled to a new trial unless the juror's failure to disclose denied [defendants] their right to an impartial jury." *Id.* at 549.

[14] Defendant argues that the juror was excusable for cause under MCR 2.511(D)(1) to (4), (6), (10), and (12). However, his basis for all of these arguments is the juror's status as a convicted felon. In defendant's motion for a new trial, defendant only argued that defendant was excusable for cause under MCR 2.511(D)(1) and (12). Nevertheless, even assuming that the defendant had properly preserved all the grounds that he is now raising, we would still conclude that defendant is not entitled to a new trial. That is, for the same reasons that we conclude that defendant failed to establish that the juror was partial, defendant failed to establish that the juror was "biased"; "show[ed] a state of mind that [would] prevent [him] from rendering a just verdict"; had "formed a positive opinion" about the case; had "opinions or conscientious scruples that would improperly influence [his] verdict"; or was "interested." MCR 2.511(D)(2) to (4) and (12). In addition, the juror had not "already sat on a trial of the same issue" and had not "complained of or . . . been accused by [defendant] in a criminal prosecution." MCR 2.511(D)(6), (10).

sufficient to rebut that juror's impartiality.[15] If even such an admission is not sufficient to rebut the presumption of impartiality, we fail to see how a juror's mere *status* as a convicted felon can be considered sufficient to rebut that presumption.

Defendant has not offered any evidence to demonstrate that he was prejudiced by the convicted felon's presence on his jury.[16] That is, defendant has offered no

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[15] The dissent fails to recognize that its conclusion that a defendant is entitled to a new trial any time a juror had a "preconceived opinion or feeling," *post* at 577, is wholly at odds with this Court's decision in *Holt,* which held that the " 'mere statement of a juror, that he has formed an opinion, is not sufficient to disqualify him.' " *Holt,* 13 Mich at 230 (citation omitted). Furthermore, the dissent's statement that, because the juror in this case committed similar crimes, he "must have had preconceived notions about defendant" is nothing more than pure speculation. *Post* at 578. Finally, although we commend the dissent for its resort to a dictionary, it completely ignores the context of the word that it is attempting to define. That is, the dissent concludes that a juror is prejudiced if he or she had a "preconceived opinion or feeling." *Post* at 577. However, MCL 600.1354(1) does not use the word "prejudice" in terms of the *juror's* "prejudice." Instead, it uses this word in terms of the *defendant's* prejudice. MCL 600.1354(1) states that a defendant is not entitled to a new trial unless the defendant demonstrates "actual prejudice to his cause . . . ." In *this* context, it is clear that the most applicable definition of "prejudice" is "damage or injury; detriment," *Random House Webster's College Dictionary* (2001), which the dissent quotes *post* at 577. A defendant is damaged or injured as a result of a juror withholding relevant information only if that juror was not impartial.

Moreover, to disagree, as we do, with the dissenting justice on the appropriate definition of a term having multiple definitions—in this instance "prejudice"—is hardly, as the dissent asserts, to manifest an "unquestioning confidence" in our own "ability to decide which dictionary definition of a word the Legislature intended." *Post* at 578 n 48. Rather, it is simply to manifest a belief that the dissenting justice is wrong.

[16] The dissent likewise does not direct us toward any evidence of prejudice. Instead, it simply *presumes* prejudice from the fact that the juror was statutorily disqualified. However, if such a presumption were

evidence to establish that the juror was partial. The juror testified that his status as a felon did not affect his deliberations and that he did not share this information with the other jurors or try to improperly persuade the rest of the jurors in any way.[17] There is simply no evidence that this juror improperly affected any other jurors. Furthermore, as the trial court explained, this juror would likely have been more harmful to the prosecutor than to defendant.[18] Having been previously convicted of similar offenses, the juror, if anything, likely would have been sympathetic towards defendant.[19] For these reasons, we do not believe that the

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permitted, MCL 600.1354(1) would be rendered meaningless. MCL 600.1354(1) specifically states that failure to comply with the statutory qualifications does *not* require a new trial unless the defendant demonstrates "actual prejudice." Yet, under the dissent's approach, failure to comply with the statutory qualifications would *always* require a new trial. Moreover, contrary to the dissent's contention, "an *appearance* of potential bias" is not "*actual* prejudice"; rather, it is, quite obviously, only an *appearance* of prejudice. *Post* at 574 (emphasis added). MCL 600.1354(1), however, clearly requires the defendant to demonstrate "*actual* prejudice." (Emphasis added.) The dissent criticizes us for equating "actual prejudice" and "actual bias." However, it fails to explain how a juror's failure to disclose information that he or she should have disclosed could actually prejudice a defendant if the juror was not actually biased.

[17] According to the trial court, the juror stated that "I had that experience, but I can be essentially fair and objective; I can be fair to the parties in this case."

[18] The dissent contends that defendant is entitled to a new trial "irrespective of which way [the juror's] bias is expected to cut . . . ." *Post* at 580. However, this contention is clearly erroneous given that MCL 600.1354(1) expressly states that the defendant must demonstrate "actual prejudice *to his cause* . . . ." (Emphasis added.)

[19] As the trial court explained:

> I'm sure that . . . had [the juror] answered those questions accurately in the questionnaire[,] the prosecutor would not have permitted him to stay on the jury. . . . I have fairly equal confidence that a defense attorney, knowing that [a] person . . . convicted of a

trial court clearly erred in ruling that defendant had not demonstrated that he was actually prejudiced by the convicted felon's presence on his jury.[20]

> crime is called to sit as a juror, especially a trial of someone who is accused of a similar type of crime, would not exercise a . . . challenge. [The] [d]efense attorney in this case . . . does not indicate to this Court that he would have exercised a . . . challenge had he known.

Many commentators have indicated that one of the rationales behind excluding convicted felons from juries is the belief that convicted felons are biased against the *government*. See, e.g., Binnall, EG1900 . . . *The number they gave me when they revoked my citizenship: Perverse consequences of ex-felon civic exile*, 44 Willamette L R 667, 672 (2008) ("One such character trait of concern to those advocating for felon exclusion from jury service is 'that felons remain adversarial towards the government and will sympathize unduly with any criminal defendant.' ") (citation omitted); Note, *A jury of one's peers: Virginia's restoration of rights process and its disproportionate effect on the African American community*, 46 Wm & Mary L R 2109, 2136 (2005) ("The state's policy argument is based on the premise that a convicted felon may be sympathetic toward a criminal defendant . . . ."); Kalt, *The exclusion of felons from jury service*, 53 Am U L R 65, 74, 104 (2003) (" '[A] person who has suffered the most severe form of condemnation that can be inflicted by the state . . . might well harbor a continuing resentment against "the system" that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils.' . . . [A] felon's 'former conviction and imprisonment [may] ordinarily incline him to compassion for others accused of crime.' In other words, a felon will be less willing, if not unwilling altogether, to subject another person to the horrors of punishment that he has endured, and may engage in nullification. He may also exhibit mistrust of police and prosecutors, and give unduly short shrift to their testimony and arguments.") (citations omitted); Note, *Invaluable tool vs. unfair use of private information: Examining prosecutors' use of jurors' criminal history records in voir dire*, 56 Wash & Lee L R 1079, 1088-1089 (1999) ("A juror convicted of a crime is likely to harbor animosity towards the government . . . . The potential for this animosity to ripen into a bias against the government's case increases when the crime underlying the juror's conviction is similar to the crime for which the defendant stands charged.").

[20] To answer the dissent's question, *post* at 580, of course convicted felons can be challenged by defendants for bias. However, a juror's mere status as a convicted felon does not by itself establish bias, and, thus, the challenging defendant will have to come forth with some actual argument concerning such bias.

In addition, the presence of a convicted felon on defendant's jury did not constitute structural error. A structural error is a "fundamental *constitutional* error[] that 'def[ies] analysis by "harmless error" standards.' " *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (emphasis added; citations omitted). Here, there was no constitutional error. As discussed above, there is no constitutional right to have a jury free of convicted felons. Therefore, that a convicted felon sat as a juror on defendant's jury did not constitute a structural error.

The Court of Appeals in the instant case relied heavily on *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948), *People v Daoust*, 228 Mich App 1; 577 NW2d 179 (1998), *People v Manser*, 250 Mich App 21; 645 NW2d 65 (2002), and *People v Crear*, 242 Mich App 158; 618 NW2d 91 (2000), to conclude that defendant is entitled to a new trial. However, none of those cases involved the question that is at issue here: whether the presence of a convicted felon on a defendant's jury requires a new trial. Furthermore, none of those cases involved the application of MCL 600.1354(1) because none involved "failure[s] to comply with the provisions of [chapter 13 of the Revised Judicature Act, MCL 600.1300 *et seq*.]."[21] and because *DeHaven* was decided before MCL 600.1354(1) was even enacted.

In *DeHaven*, a case in which the defendant was charged with and ultimately convicted of raping his 13-year-old stepdaughter, two related jurors failed to disclose that one of their family members had been convicted of raping his 13-year-old daughter. The trial court found that the jurors had not been dishonest during voir dire, that they had indicated that they could

[21] The dissent altogether ignores that none of those cases involved the application of MCL 600.1354(1).

fairly and impartially sit as jurors, and that any prejudices the jurors did have would likely have benefitted the defendant anyway. For these reasons, the trial court denied the defendant's motion for a new trial. This Court reversed.

After indicating that the "right to be tried by an impartial jury is a constitutional guaranty," *DeHaven* concluded:

> The normal person revolts at the thought of a father or stepfather raping a 13-year-old girl. We are of the opinion that the relationship of these two jurors to one who had committed a similar crime was such that it deprived them of the capacity to act impartially. Defendant has the right to a trial by an impartial jury. We cannot say that he had such a trial. [*DeHaven*, 321 Mich at 334.]

As discussed earlier, *DeHaven* is distinguishable from the instant case because the former did not involve a juror who was a convicted felon and it did not involve MCL 600.1354(1).[22] In addition, it appears that *DeHaven* reviewed de novo the question whether the two jurors were biased, rather than for clear error. As discussed above, an appellate court must review a trial court's factual findings for clear error, *Cress*, 468 Mich at 691, and the appellate court should only reverse such

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[22] In *DeHaven*, the jurors had a *family member* who was a convicted rapist and a family member who was a rape *victim*, while, in the instant case, the juror was *himself* convicted of assault with the intent to commit criminal sexual conduct. As *DeHaven* indicated, the "normal person revolts at the thought of a father or stepfather raping a 13-year-old girl." *DeHaven*, 321 Mich at 334. Accordingly, in *DeHaven*, it is significantly more likely that the jurors, if anything, would have been prejudiced *against* the defendant because a 13-year-old girl in their family had recently been a victim of such a revolting crime. On the other hand, in the instant case, as discussed earlier, it is more likely that the juror, if anything, would have been prejudiced *in favor* of the defendant because the juror had himself been convicted of similar crimes, although obviously this is all speculative.

findings if it is "left with a definite and firm conviction that a mistake has been made." *Johnson*, 466 Mich at 497-498. In *DeHaven*, the trial court determined that the jurors were not biased, but, even if they were, such bias would have benefitted the defendant. *DeHaven,* 321 Mich at 331. *DeHaven*, however, did not even mention the trial court's factual findings in its analysis, and clearly reviewed the issue de novo. That is, *DeHaven* concluded that the jurors were biased and that they were biased against the defendant, without giving any significance to the fact that the trial court, which was obviously in the better position to determine whether the jurors were biased and against which party, had already concluded that the jurors were not biased, but, if they were, they were biased in favor of the defendant.

DeHaven also reviewed de novo, rather than for an abuse of discretion, the issue whether defendant was entitled to a new trial. As discussed earlier, a trial court's decision to deny a motion for a new trial must be reviewed for an abuse of discretion. *Cress,* 468 Mich at 691. An abuse of discretion occurs only "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *Babcock*, 469 Mich at 269. In *DeHaven*, the trial court held that the defendant was not entitled to a new trial. However, *DeHaven*, without giving any significance at all to the trial court's decision, held that the defendant was entitled to a new trial. That is, *DeHaven* clearly engaged in de novo review, rather than the abuse of discretion review that it should have.[23]

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[23] We are simply perplexed by the dissent's assertion that the standard of review is "irrelevant." *Post* at 573. An appellate court cannot even begin to review a trial court's decision without knowing what the applicable standard of review is, and the fact that an appellate court has employed a plainly inappropriate standard should, at the least, cause future courts to hesitate before they rely on that prior decision. Further-

Moreover, our "harmless error" jurisprudence has evolved significantly since *DeHaven* was decided in 1948. As explained in *People v Bell*, 473 Mich 275, 294; 702 NW2d 128 (2005) (opinion by CORRIGAN, J.), "our harmless error jurisprudence has evolved a great deal . . . ." Errors generally no longer require automatic reversal. *Id.*, citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Instead, a preserved, nonconstitutional error is not a ground for reversal unless the defendant proves that it is "more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Even a preserved, constitutional error is generally not a ground for reversal if the prosecutor proves that the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).[24] An unpreserved error is not a ground for reversal unless the defendant can demonstrate that the error was plain, that it affected the outcome, and that it resulted in the conviction of an actually innocent person or " ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" . . . .' " *Carines*, 460 Mich at 763-764 (citations omitted).

With regard to the specific issue here, i.e., juror misconduct, this Court has held that "a verdict in a criminal case should not be upset because of alleged misconduct on the part of members of the jury unless 'substantial harm' has resulted . . . ." *Nick,* 360 Mich at 230. " ' "[A litigant] is entitled to a fair trial but not a perfect one" for there are no perfect trials.' " *McDon-*

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more, contrary to the dissent, an appellate court cannot effectively immunize itself from criticism for failing to apply the correct standard of review by simply not stating *what* standard of review is being applied.

[24] As discussed earlier, a structural error that defies "harmless error" analysis still requires automatic reversal. *Anderson*, 446 Mich at 405.

ough, 464 US at 553 (citations omitted). "We have . . . come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered ' "citadels of technicality." ' " *Id.* (citations omitted). "The harmless-error rules . . . embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Id.* *DeHaven*, however, made absolutely no mention of any "harmless error" standard.

Finally, the crux of *DeHaven*'s holding was that a defendant has a constitutional right to an impartial jury and, because the jurors at issue in *DeHaven* lacked the capacity to act impartially, the defendant was entitled to a new trial. *DeHaven*, 321 Mich at 334. There is no question that a criminal defendant has a constitutional right to be tried by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. However, the instant question is whether the presence of a convicted felon on defendant's jury denied defendant his right to an impartial jury. For all the reasons noted earlier, *DeHaven* is neither binding nor persuasive precedent with regard to this question.[25]

In *Daoust*, the defendant was charged with two counts of first-degree child abuse on the basis of injuries that he inflicted on his girlfriend's daughter. On the morning of the second day of defendant's trial, during a break in the girlfriend's testimony, one of the jurors indicated that he may have attended junior high school with the girlfriend. The trial court denied defendant's request to remove the juror, and the Court of Appeals held that defendant was not entitled to a new trial. The Court of Appeals held that

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[25] The dissent criticizes us for not overruling *DeHaven*. However, we do not do so because we simply do not see it as being controlling with regard to the issue here.

> when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question *or* (2) that the juror was properly excusable for cause. [*Daoust*, 228 Mich App at 9 (emphasis added); see also *Crear*, 242 Mich App at 167, which cited this two-part test with approval.]

To the extent that in *Daoust* the Court of Appeals broadly states in dicta that a new trial is *always* required whenever a juror would have been excusable for cause, *Daoust* is wrong and is overruled.[26] As discussed earlier, the proper inquiry is whether the defendant was denied his right to an impartial jury. If he was not, there is no need for a new trial.

IV. CONCLUSION

The trial court did not clearly err in finding that defendant failed to establish that he was actually prejudiced by the presence of a convicted felon on his jury, and, thus, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for it to address defendant's remaining issues.

TAYLOR, C.J., and WEAVER, CORRIGAN, and YOUNG, JJ., concurred with MARKMAN, J.

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[26] To the extent that *Crear* and *Manser* relied on *Daoust* for this proposition, they are also wrong and overruled. The dissent contends that there is no reason to overrule these decisions because they can be "read harmoniously with § 1354(1) in that, if a juror is excusable for cause and is left impaneled, actual prejudice results." *Post* at 574. However, as discussed in footnote 16 of this opinion, presuming prejudice on the basis of a statutory disqualification would render MCL 600.1354(1) meaningless.

KELLY, J. (*dissenting*). At issue in this case is whether defendant is entitled to a new trial because a convicted felon served as a juror in his original trial. The majority concludes that the trial court correctly denied defendant's motion for a new trial. The court ruled that defendant had failed to establish that he was actually prejudiced, pursuant to MCL 600.1354(1), by the presence of a convicted felon on his jury. The majority finds no clear error in this ruling. For the reasons set forth below, I believe that the Court of Appeals properly reversed the trial court and granted defendant a new trial. Its opinion should be affirmed.

I. FACTS AND PROCEDURAL HISTORY

The Ottawa County Prosecutor's Office charged defendant with one count of first-degree criminal sexual conduct (CSC I). The charge was based on defendant's alleged act of forcing his ex-girlfriend's seven-year-old daughter to perform fellatio on him. Following a two-day jury trial, defendant was convicted as charged. Defense counsel then learned that one of the deliberating jurors, Jesse Lara, was a registered sexual offender. Defendant filed a motion for a new trial based on juror misconduct. Lara had answered "No" to a question on his juror questionnaire regarding whether he had ever been a defendant in a criminal case.

The trial court held an evidentiary hearing. Lara testified that he had been convicted of assault with intent to commit sexual conduct involving penetration seven years before and criminal sexual conduct 15 years before. As a result of these convictions, he was required to register with the Michigan Public Sexual Offender Registry. Lara also testified that one of his victims was his sister. He referred to the other as "an adopted child" who was "more like a niece." Lara further stated that

he had completed and signed a juror questionnaire that contained the following question: "Have you ever been a victim, witness, plaintiff, or defendant in a criminal or civil suit?" The questionnaire also asked whether he had been convicted of a felony, misdemeanor, or traffic violation. He answered "No" to both questions.

Lara justified his "No" answers by stating that he had been untruthful "because that was a long time ago." He claimed that he thought his convictions would remain on his record only "for maybe seven years." Essentially, he claimed that he believed his convictions to be too old to matter. Lara acknowledged that he never asked for clarification from the trial judge or lawyers for either party about whether he was required to divulge his prior criminal convictions. Accordingly, he did not volunteer his convictions during voir dire.

Lara claimed that he tried to be fair during the trial. He asserted that he never tried to persuade the jury in any particular way because of his personal criminal history. He said that he never disclosed his prior convictions during deliberations or the fact that he had personal experience with how criminal cases are handled.

The judge concluded that Lara was truthful during the evidentiary hearing. The judge also determined that, had Lara answered the questions on the juror questionnaire truthfully, the prosecutor would have had him excused from the jury. The judge concluded:

> I have fairly equal confidence that a defense attorney, knowing that the person . . . convicted of a crime is called to sit as a juror, especially a trial of someone who is accused of a similar type of crime, would not exercise a peremptory challenge . . . . Defendant does not indicate to this court that he would have exercised a peremptory challenge had he known.

> There is no evidence presented at this hearing or anything from any other source that Mr. Lara's presence on the jury resulted in actual prejudice to the defendant.

Accordingly, the trial court denied defendant's motion for a new trial.

The Court of Appeals reversed defendant's conviction and remanded for a new trial. The Court relied on *People v DeHaven*.[1] It determined that, because the crimes committed by defendant and Lara were similar in that they involved criminal sexual conduct, defendant had not been afforded a fair and impartial jury. Thus, defendant had been prejudiced within the meaning of § 1354(1).

We granted leave to appeal[2] to determine (1) whether the Court of Appeals properly relied on *DeHaven,* (2) whether *DeHaven* has been superseded by §1354(1), (3) whether a criminal defendant must establish actual prejudice pursuant to § 1354(1) if the challenged juror was excusable for cause, (4) how the actual prejudice standard for purposes of § 1354(1) should be defined, and (5) whether Lara's failure to disclose his status as a convicted felon, which disqualified him from serving as a juror, constitutes structural error pursuant to *Neder v United States*.[3]

II. ANALYSIS

A. *LEGAL BACKGROUND*

Juror qualifications are set forth in several statutes relevant to this case. MCL 600.1307a provides, in rel-

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[1] *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948).

[2] *People v Miller*, 481 Mich 851, 851-852 (2008).

[3] *Neder v United States*, 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

evant part, that in order to qualify as a juror, a person shall not have been convicted of a felony.[4] Failure to comply with this provision renders a potential juror challengeable for cause.[5] Furthermore, "[i]f . . . the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from

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[4] MCL 600.1307a(1)(e).

[5] MCR 2.511(D) provides:

> It is grounds for a challenge for cause that the person:
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> (1) is not qualified to be a juror;
>
> (2) is biased for or against a party or attorney;
>
> (3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
>
> (4) has opinions or conscientious scruples that would improperly influence the person's verdict;
>
> (5) has been subpoenaed as a witness in the action;
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> (6) has already sat on a trial of the same issue;
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> (7) has served as a grand or petit juror in a criminal case based on the same transaction;
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> (8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;
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> (9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;
>
> (10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;
>
> (11) has a financial interest other than that of a taxpayer in the outcome of the action;
>
> (12) is interested in a question like the issue to be tried.

the panel."[6] This rule was also codified in MCL 600.1337, which states, "When the court finds that a . . . juror is not qualified to serve . . . , or is exempt and claims an exemption, the court shall discharge him or her from further attendance and service as a juror." Thus, the Legislature has made clear that those not meeting the relevant qualifications for jury service are not to be included on a jury. Finally, MCL 600.1354(1) provides, in pertinent part:

> Failure to comply with the provisions of this chapter shall not . . . affect the validity of a jury verdict unless the party . . . claiming invalidity has made timely objection and unless the party demonstrates actual prejudice to his cause and unless the noncompliance is substantial.

Michigan courts have examined the legal effect of violations of these principles on numerous occasions. The facts of the leading case on the issue, *People v DeHaven*, are strikingly similar to those of the instant case. In *DeHaven*, the defendant was charged with the rape of his 13-year-old stepdaughter.[7] The case was submitted to a jury, which returned a guilty verdict.[8] The defendant moved for a new trial, arguing that two of the jurors had failed to disclose that a member of their family had been imprisoned for a similar offense.[9] The trial court denied the motion, ruling that the jurors had not been prejudiced and that nothing indicated that, if they had been prejudiced, it would likely have benefited the defendant.[10] The defendant appealed. This Court held that the relationship of the two jurors to a person who had committed a similar crime deprived

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[6] MCR 6.412(D)(2).

[7] *DeHaven*, *supra* at 329.

[8] *Id*.

[9] *Id*.

[10] *Id*. at 331.

them of the capacity to act impartially.[11] Because criminal defendants are guaranteed the right to a trial by an impartial jury by both the United States[12] and Michigan constitutions,[13] the Court unanimously reversed defendant's judgment of conviction.[14]

This Court revisited the issue of juror misconduct in *People v Hannum*.[15] The defendant in *Hannum* was granted a new trial when a member of the jury failed to disclose that he was a township police officer and special county sheriff's deputy. The Court, relying on *DeHaven*, held that the defendant had been denied a fair trial by an impartial jury because the lack of disclosure of the pertinent fact "can hardly be thought to have insured an impartial trial any more so than in *DeHaven* . . . ."[16] Furthermore, the Court noted, "[w]ould any experienced trial lawyer, or, for that matter, the public gener-

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[11] *Id*. at 334.

[12] US Const, Am VI.

[13] Const 1963, art 1, § 20.

[14] *DeHaven*, *supra* at 335. The Court also noted:

> Examination into the competency of a juror, when he is challenged, is essentially a taking of such prospective juror's testimony to determine whether he has the statutory qualifications of a juror and is free from prejudice or interest, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. . . . He is not, however, the judge of his own competency, impartiality, and freedom from prejudice, in the sense that his testimony is to be accepted as final and conclusive of the issue, and no statute can clothe him with such judicial discretion and power. His competency is left to the determination of the court or of triors, who are not bound by his testimony but may rely on other evidence. [*Id*. at 332 (citation and quotation marks omitted).]

[15] *People v Hannum*, 362 Mich 660; 107 NW2d 894 (1961).

[16] *Id*. at 667. While I recognize that the juror in *Hannum* was not statutorily disqualified, as is Lara, it is noteworthy that the Court held that the defendant had been denied a fair trial.

ally, feel differently as to the capacity of a local police officer to sit as a juror and consider impartially the case of a defendant charged with a crime committed in the community? We think not."[17]

The Court of Appeals addressed the same issue in *People v Manser*.[18] *Manser* involved a defendant charged with CSC I and CSC II.[19] The defendant was convicted of both charges.[20] On appeal, he argued that he was deprived of his constitutional right to a fair and impartial jury because the trial court had refused to remove a juror. The juror had failed initially to disclose information relevant to her ability to sit objectively in judgment of the case.[21] Specifically, the juror had failed to disclose that she had engaged in "inappropriate behavior" with a cousin when both were preteens.[22]

The Court of Appeals agreed that this failure to disclose warranted a new trial. It held that, had the juror disclosed during voir dire the inappropriate sexual conduct with her cousin, grounds for dismissal for cause would have been presented.[23] Moreover, the Court noted that, had the information been revealed during voir dire, a peremptory challenge would have been used if a challenge for cause had been denied.[24] Finally, the Court held that seating a juror who withheld information that should have been revealed presents too great a risk that the jury will not be impartial:

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[17] *Id.* at 666.

[18] *People v Manser*, 250 Mich App 21; 645 NW2d 65 (2002).

[19] *Id*. at 23-24.

[20] *Id*. at 24.

[21] *Id*.

[22] *Id*. at 26.

[23] *Id*. at 28.

[24] *Id*.

> By failing to be forthcoming with her account of the inappropriate sexual conduct she experienced with an older relative, [the juror] subverted the efforts of the trial court and defense counsel to assure that persons having that kind of background were not seated as factfinders. This resulted in at least an appearance of impropriety. . . .[25]

The Court concluded by stating that, under these circumstances, the trial court should have granted defendant some form of relief. It should have either considered the propriety of proceeding with 11 jurors or granted defendant a mistrial.[26]

In *People v Daoust*,[27] the Court of Appeals addressed whether the trial court deprived the defendant of a fair trial by refusing to remove a juror during trial. At a break in a witness's testimony, one of the jurors indicated to a bailiff that he may have attended the same junior high school as the witness.[28] The defendant conceded that there were no circumstances justifying the juror's discharge for cause. However, he argued that he would have exercised a peremptory challenge to remove the juror had he known of the juror's link to the witness during voir dire.[29] The trial court denied the defendant's request to remove the juror.[30] On appeal, the Court of Appeals held:

> [W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury [has been] sworn, the defendant is entitled to relief . . . if he can establish (1) that he was actually prejudiced by the pres-

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[25] *Id*. at 30.

[26] *Id*.

[27] *People v Daoust*, 228 Mich App 1; 577 NW2d 179 (1998).

[28] *Id*. at 6.

[29] *Id*.

[30] *Id*.

> ence of the juror in question or (2) that the juror was properly excusable for cause.[31]

The defendant in *Daoust* did not argue that he had been actually prejudiced or that the juror was removable for cause. Hence, the Court held that he was not entitled to relief.[32]

B. *APPLICATION*

The aforementioned cases demonstrate a longstanding adherence to a principle expounded in both the federal and state constitutions: criminal defendants are entitled to a fair and impartial jury. I believe that defendant was not afforded this right given the fact that Lara was allowed to participate as a juror. Under § 1307a, to qualify as a juror, a person must not have been convicted of a felony. Because Lara had been convicted of CSC, he was admittedly not qualified to be a juror. Defendant raised the issue of Lara's disqualification as soon as Lara's convictions became known.

Pursuant to § 1354(1), noncompliance with juror qualifications results in error requiring reversal only if the noncompliance actually prejudices the defendant and if the noncompliance is substantial. It remains undisputed that Lara's disqualification is a substantial violation under § 1354(1). He failed to satisfy the criteria necessary to serve as a juror set forth in MCR 2.511(D) and § 1307a. The question then becomes whether defendant was actually prejudiced within the meaning of § 1354(1).

DeHaven and its progeny are reasonably similar to this case. In *DeHaven*, the defendant was convicted of

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[31] *Id*. at 9. The Court of Appeals reiterated this holding in *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

[32] *Daoust, supra* at 9.

rape for engaging in sexual conduct with his stepdaughter. During voir dire, the court asked prospective jurors whether any had experience with a criminal case and whether any of their relatives had been involved in a similar case involving rape. All answered in the negative, including a juror who had a family member who had been convicted of raping a minor. A second juror, who was also related to the family member, also denied any such prior experience. In reversing the conviction and remanding for a new trial, this Court stated:

> In the case at bar the jurors stated on *voir dire* examination that they could fairly and impartially sit as jurors in the case; and that there was no other case that they had heard about which would influence their verdict. . . . We are of the opinion that the relationship of these two jurors to one who had committed a similar crime was such that it deprived them of the capacity to act impartially. Defendant has the right to a trial by an impartial jury. We cannot say that he had such a trial.[33]

Here, the crimes of which defendant is accused and that Lara committed relate to CSC. Moreover, Lara himself committed the crimes, not merely a relative, as in *DeHaven*. The Court of Appeals in this case recognized the similarity, holding:

> Here, the crimes committed by . . . defendant and the challenged juror were also similar in nature [like those in *DeHaven*], relating to criminal sexual conduct. Moreover, the challenged juror himself had committed the crimes, not just a relative as in *DeHaven*. Further, while the challenged juror proclaimed that he was fair, impartial, and listened to the evidence, arguments, and instructions, the jurors in *DeHaven* also claimed an ability to be fair and impartial,

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[33] *DeHaven*, *supra* at 334.

> yet the Supreme Court reversed. Accordingly, defendant was not afforded a fair and impartial jury and was thus *prejudiced*.[34]

Thus, the Court of Appeals explicitly determined that defendant had been prejudiced. Given the obvious factual similarities between the two cases, I believe the Court of Appeals properly relied on *DeHaven*. Likewise, although the challenged jurors in *DeHaven* indicated that they had been fair, impartial, and had listened to the evidence, so too did Lara. However, as the *DeHaven* Court found this effort to be insufficiently protective of the defendant's right to a fair and impartial jury, the Court of Appeals properly granted defendant a new trial.[35]

The majority struggles at length to distinguish *DeHaven* and *Daoust*. It claims that *DeHaven* used a de novo standard of review of the trial court's finding that the two jurors were biased, rather than the clear error standard used today.[36] According to the majority, the *DeHaven* Court also used a de novo standard of review

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[34] *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2008 (Docket No. 273488), at 3 (emphasis added).

[35] The majority claims that because *DeHaven* was decided before the enactment of MCL 600.1354(1), it should not be considered controlling. This argument is unpersuasive for several reasons. First, in *Crear*, *supra* at 167, the Court of Appeals, relying on *Daoust* (which relied on *DeHaven*) held that a defendant must establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause. *Crear* was decided in light of § 1354(1) in 2000 and implicitly acknowledged the import of § 1354(1) by recognizing that actual prejudice must be shown to warrant a new trial. Second, *Crear* can be read harmoniously with § 1354(1) by incorporating the failure to remove a juror excusable for cause into the parameters of actual prejudice within the meaning of the statute. This is entirely possible, especially given the lack of a definition for "actual prejudice" in § 1354(1).

[36] *Ante* at 557.

when deciding defendant was entitled to a new trial.[37] At the outset, the standard of review in *DeHaven* is irrelevant to the issue presently before the Court of whether defendant was denied a fair and impartial trial in this case.[38] More importantly, however, wholly absent from *DeHaven* is any language indicating which standard of review was used. Therefore, the majority's attempt to distinguish *DeHaven* on this basis is unavailing.[39]

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[37] *Ante* at 558.

[38] The majority mistakenly mingles the standard of review in this case with the standard of review used in *DeHaven*. I agree that the proper standard in this case is review of the trial court's factual findings for clear error. The decision on the motion for a new trial is reviewed for an abuse of discretion. My agreement ends there.

It is not relevant what standard the *DeHaven* Court applied. *DeHaven* is devoid of any indication of the deference (or lack thereof) paid to the trial court's decision in that case. Thus, it is mere conjecture for the majority to state that the *DeHaven* Court improperly engaged in a review de novo. *Ante* at 557-558.

[39] The majority opinion seems to overrule *DeHaven* because it applied the wrong standard of review. Yet, the majority avoids outright abrogation of *DeHaven* by simply stating that *DeHaven*'s holding is neither binding nor persuasive precedent.

Furthermore, the majority discards *DeHaven*'s reasoning because the case was decided before the enactment of § 1354(1). Yet, the majority relies on *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127; 523 NW2d 849 (1994), and *People v Carey*, 110 Mich App 187; 312 NW2d 205 (1981), as support for its framing of "actual prejudice." This reliance makes little sense given that these cases also predate § 1354(1). See also *People v Graham*, 84 Mich App 663; 270 NW2d 673 (1978), which held that the party moving for a new trial must present proof of actual prejudice. If not, it must satisfy the trial court that the moving party would have successfully challenged for cause or otherwise dismissed the juror had the truth been revealed before trial.

I conclude that *DeHaven* is precedential with respect to Lara's lack of qualification to serve as a juror and defendant's entitlement to a new trial. *DeHaven* should either be read as controlling or should be overruled. If *DeHaven* is not applicable here, then it is not applicable anywhere and should not be left hanging in the wind.

With respect to *Daoust*, the majority makes no attempt to distinguish the relevant facts. Yet it concludes that, to the extent that *Daoust* holds that a new trial is required whenever a juror would have been excusable for cause, it is overruled.[40] However, there is no need for the majority to overrule *Daoust.* It could be read harmoniously with § 1354(1) in that, if a juror is excusable for cause and is left impaneled, actual prejudice results.

Furthermore, I believe *Manser* provides guidance and demonstrates the soundness of the Court of Appeals decision in this case. A juror in *Manser* indicated after trial had begun that she had engaged in conduct similar in nature to that alleged against the defendant. Despite the defendant's attempt to remove the juror, the court continued the trial with the juror impaneled. In reversing the defendant's conviction, the Court noted that the juror was removable for cause and thus defendant was entitled to a new trial. Although the Court did not use the word "prejudice," its holding essentially stated that the defendant was prejudiced by a juror whose presence created the appearance of a potential bias. Here, Lara would have been removable for cause pursuant to MCR 2.511(D) had he disclosed his previous convictions. Moreover, it is without question that Lara's presence created, at a minimum, an appearance of potential bias.[41] Therefore, the Court of Appeals properly granted defendant's motion for a new trial.

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[40] A*nte* at 561.

[41] The majority conflates "actual prejudice" with "actual bias." *Ante* at 554 n 16. Section 1354(1) requires a showing of actual prejudice. This is not the same as actual bias. Indeed, as recognized explicitly by *Holt v People*, 13 Mich 224 (1865), and implicitly by *DeHaven*, *Hannum*, *Manser*, *Daoust*, *Crear*, and *Froede*, the appearance of partiality or bias creates a reasonable doubt sufficient to satisfy § 1354(1).

Finally, the majority attempts to distinguish *Froede v Holland Ladder & Mfg Co*.[42] *Froede* involved a juror who misrepresented her criminal history on the juror questionnaire. The juror had hired an assassin to kill a drug informant who had agreed to testify against the juror's ex-husband. In applying § 1354(1), the Court of Appeals granted a new trial because it held that the juror's criminal conviction and misrepresentation of her criminal background constituted actual prejudice.

The Court pointed out several noteworthy considerations that bear on this case. First, *Froede* was a civil case. Although MCR 6.412(D)(2) requires that a trial court in a criminal case excuse a juror challenged for cause under MCR 2.511(D), there is no similar requirement in civil matters. As the Court noted, "we find that the existence of potential biases or prejudices of a juror with a prior felony conviction is substantially lessened in a civil case as opposed to a criminal case."[43] Thus, explicit in the Court's holding is its recognition that, in criminal cases, the potential for a convicted felon's bias to reveal itself is higher than in civil cases. Second, the Court noted that the conviction could "reflect on the juror's honesty, and, given the nature of the conviction, th[e] juror may well have infected the jury's deliberations."[44]

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[42] *Froede*, *supra*.

[43] *Id*. at 133.

[44] *Id*. at 134. In *Froede*, the trial court found that the juror had deliberately misrepresented her criminal history. In this case, the trial court found that Lara was not "attempting to be deceitful or that he had any ulterior motive in answering the[] [jury] question[naire]." The majority distinguishes *Froede* on this basis. While the trial court found that Lara's responses lacked deceit, Lara had no incentive to state that he had been dishonest or deliberately misrepresented his criminal history. Thus, absent an admission by Lara, the trial court had no basis on which to determine whether Lara had been deceitful in answering the questionnaire.

Based as it was on the principles expounded in *DeHaven*, *Hannum*, *Manser*, *Daoust*, *Crear*, and *Froede*, the Court of Appeals decision to grant defendant a new trial was well reasoned. Moreover, the Court explicitly held that defendant was prejudiced and thus satisfied the statutory requirement set forth in § 1354(1).

III. RESPONSE TO THE MAJORITY

The majority opinion is deficient in several respects. First, it fails to address how the "actual prejudice" standard for purposes of § 1354(1) should be defined.[45]

[45] The closest the majority comes to defining actual prejudice is its assertion that juror misconduct is only prejudicial if it denies a defendant an impartial jury. *Ante* at 548. Essentially, this is an outcome-determinative standard in disguise. The majority further opines that "[t]he burden is on the defendant to establish that the juror was not impartial . . . ." *Ante* at 550, citing *Holt v People*, 13 Mich 224, 228 (1865). However, *Holt* requires a defendant to show only that a juror's impartiality is in reasonable doubt. *Id*. at 227. Thus, contrary to the majority's analysis, *Holt* does not either explicitly or implicitly require a defendant to prove actual bias by the disqualified juror. Yet actual bias is what the majority requires in this case. Indeed, although the majority correctly cites *Holt*, it fails to recognize that the reasonable doubt standard in *Holt* requires less than actual bias to establish actual prejudice. Compare *ante* at 550 with *ante* at 554 n 16. The majority, under the guise of statutory interpretation, is effectively legislating from the bench by crafting the words "actual bias" into § 1354(1), when no such language exists.

Furthermore, the majority's analysis fails to provide guidance to lower courts. Specifically, it leaves unresolved how a defendant is to prove actual prejudice (or partiality as the majority would have it) absent an admission by a juror that he possessed bias in rendering a verdict. The majority also selectively cites Note, *When jurors lie: Differing standards for new trials*, 22 Am J Crim L 733, 737 (1995), for the proposition that some states require a showing of juror bias before they will grant a defendant a new trial. *Ante* at 549 n 9. However, this article reveals that the states employ different standards including (1) a showing of possible bias, (2) a showing that the juror would have been struck for cause had the undisclosed information been revealed on voir dire, and (3) a showing of no bias at all. *See TK Stanley, Inc v Cason*, 614 So 2d 942, 949 (Miss, 1992); *Gainesville Radiology Group v Hummel*, 263 Ga 91, 93; 428 SE2d

As stated earlier, § 1354(1) requires a finding of actual prejudice resulting from an error in order for reversal to be required. However, nowhere in that section is there a definition of "actual prejudice."

DeHaven and its progeny, including *Daoust* and *Crear*, suggest that a defendant need only establish (1) that he was either actually prejudiced by the disqualified juror's participation or (2) that the juror was excusable for cause. This line of cases seems to suggest that actual prejudice occurs automatically upon a juror's improper participation in a case. While § 1354(1) and caselaw may seem to offer different interpretations of what a defendant must establish to obtain a new trial, it is unquestionable that one must show actual prejudice. However, because the statute does not offer its own definition of "actual prejudice," a starting point for analysis is the dictionary definition of the words. "Actual" means "(1) existing in act, fact, or reality; real" and "(2) existing now; present; current."[46] "Prejudice" means:

> (1) an unfavorable opinion or feeling formed beforehand or without knowledge, thought, or reason. (2) any preconceived opinion or feeling, either favorable *or* unfavorable. (3) unreasonable feelings, opinions, or attitudes, [especially] of a hostile nature, regarding a racial, religious, or national group. (4) such attitudes considered collectively . . . . (5) damage or injury; detriment . . . . (6) to affect with a prejudice.[47]

On the basis of these definitions, a defendant should have to demonstrate an existing unfavorable opinion or the presence of a preconceived opinion or feeling,

786 (1993); *Wright v Bernstein*, 23 NJ 284, 294-295; 129 A2d 19 (1957).

[46] *Random House Webster's College Dictionary* (2001).

[47] *Id.* (emphasis added).

whether favorable or unfavorable.[48]

Applying this requirement to this case, the Court of Appeals should be affirmed. Lara must have had preconceived notions about defendant, whether favorable or unfavorable, merely because he had committed crimes similar to those charged here.[49] This reasoning is also in line with *DeHaven*, *Hannum*, *Manser*, *Crear*, and *Daoust*.

This result also makes practical sense, which highlights the second flaw in the majority opinion. Trial courts must exclude unqualified jurors if facts are present indicating that a juror is unfit for service.[50] It logically follows, then, that a defendant should not be burdened with proving prejudice beyond what a court must find to exclude an unqualified juror. To do so would allow jurors to conceal relevant information and then sit on juries anyway. In effect, this would create an insurmountable standard for a defendant to overcome.

Promoting juror honesty is a laudable goal and one that is essential to the selection of a fair and impartial

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[48] Contrary to the majority's belief, this standard does not contradict *Holt*. *Holt* requires that a defendant show only that a juror's impartiality is in reasonable doubt. This proof is merely a means to demonstrate actual prejudice as required by § 1354(1). In any event, it is noteworthy that the majority exhibits its usual unquestioning confidence in its ability to decide which dictionary definition of a word the Legislature intended. See, e.g., *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 57-58; 746 NW2d 282 (2008). Plucking one definition from a basket of many is nothing less than speculation in the guise of omniscience.

[49] I refute the majority's contention that it is "pure speculation" to believe that an ex-felon would have some sort of "prejudice," as defined above, about a defendant. *Ante* at 553 n 15. One convicted of the same crime charged against a defendant would, at a minimum, be thoroughly familiar with the nature of the crime(s) charged. The convict would know how such crimes are committed, the emotions and feelings associated with the guilt accompanying the criminal act(s), and criminal procedure in general.

[50] MCR 6.412(D).

jury in criminal cases. It is likewise essential to the fair administration of justice. If the standard for obtaining a new trial based on juror dishonesty is so high that it can rarely be established, then there is no remedy for defendants convicted by dishonest jurors.[51] It is for this reason that the majority opinion becomes unworkable and manifestly unjust.

Furthermore, there is no indication that the Legislature intended such a heightened standard. Section 1354(1) merely indicates that "actual prejudice" must be shown. If jurors such as Lara sit on juries despite their lack of qualifications, evidentiary hearings will be necessary to determine whether the disqualified juror infected the entire jury. This would require the presence of all deliberating jurors. Arguably, such a hearing would border on impeachment of a verdict through cross-examination of the jurors regarding their deliberations, a practice that is discouraged.[52] The holding of such evidentiary hearings would become extremely burdensome on the court system. Yet it remains unclear in what other way a defendant could meet an actual

[51] Section 1354(1) requires a showing of actual prejudice. However, the majority opinion interprets actual prejudice so narrowly that prejudice will be impossible to prove, absent a juror admitting actual bias. *Ante* at 552-554. This standard is too strict. Often, jurors will not admit bias, especially after rendering a verdict, because they have a stake in defending their decision. Furthermore, the majority opinion implies that anytime a former juror states that he or she was unbiased, a defendant cannot demonstrate prejudice. Presumed bias must be accepted in some instances, and this is one such instance. In fact, the majority opinion's exceedingly narrow standard effectively renders the jury qualification standards meaningless. Any verdict that was rendered with an unqualified juror is unassailable because simply showing a lack of qualification(s) is not enough to show prejudice. I believe that the juror qualifications set forth in MCR 2.511(D) should be given more force.

[52] *Consumers Power Co v Allegan State Bank*, 388 Mich 568; 202 NW2d 295 (1972).

prejudice burden under the majority's standard. Essentially, overturning a verdict because of juror misconduct becomes impossible.

Finally, the majority engages in a purely speculative exercise in its attempt at labeling Lara and other unqualified jurors who have been convicted of felonies as favorable to criminal defendants. Without question, criminal defendants are entitled to a fair trial, which includes the impaneling of an impartial jury. The seating of a biased juror, irrespective of which way his or her bias is expected to cut, is an error in the eyes of the law. This is evidenced by statutes and court rules that seek to weed out such errors.[53] Indeed, assuming—or guessing, as the majority does—who benefits from the bias is folly. At some point, a juror's past experience must lead to a presumption of bias because of the juror's inherent knowledge from experience. In this case, this presumption exists because Lara's past experiences are so similar to the current defendant's alleged crimes.

The majority wrongly speculates that convicted felons on juries will help defendants. Moreover, it should not engage in any exercise that could harm the administration of justice. Essentially, the majority opines that a convicted felon's bias is acceptable because it is assumed that most felons will be sympathetic toward defendants. Is it now the law that all felons are assumed to be sympathetic to defendants and thus they can never be challenged by defendants for bias? Moreover, are felons' biases always assumed against prosecutors, such that if the parties' positions in this case were reversed, the prosecutor would have a strong claim of

[53] The majority ignores the purpose of MCR 2.511(D) and MCL 600.1337. These rules were set forth in an attempt to eliminate potential bias from juries.

bias? Are felons so homogenous that such a broad generalization is worthy of judicial codification? I think not.

IV. CONCLUSION

The Court of Appeals properly held that defendant was entitled to a new trial. In doing so, the Court properly relied on *DeHaven* and its progeny for the proposition that a convicted felon serving on a jury constitutes prejudice within the meaning of § 1354(1). Accordingly, I would affirm the Court of Appeals and remand this case to the trial court for a new trial.

CAVANAGH, J. I concur with Justice KELLY's result.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Summary Dispositions July 18, 2008:

PEOPLE v BOBBY MARTIN, Nos. 132168, 132169, and 132170. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the Court of Appeals decision holding that the trial court erred when it instructed the jury that it could convict defendants of keeping a house of prostitution as a necessarily included lesser offense of racketeering. This Court has made clear that a harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *People v Cornell,* 466 Mich 335, 361-362 (2002), citing *People v Mosko,* 441 Mich 496, 503 (1992). Because the Court of Appeals failed to consider whether the error was harmless, we do so.

Preserved, nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *Cornell, supra* at 363-364. We conclude that the error was not harmless. See *People v Hawthorne,* 474 Mich 174 (2006); *People v Silver,* 466 Mich 386 (2002). It is not likely that defendants would have been convicted of keeping a house of prostitution had the trial court not erroneously instructed the jury that it could be considered as a lesser included offense of racketeering. Reported below: 271 Mich App 280.

KELLY, J. (*concurring*). The Court of Appeals correctly held that the trial court erred by instructing the jury that it could convict defendants of keeping a house of prostitution. If a harmless error analysis applies in this situation, I agree that the instructional error was not harmless.

I write separately because I believe that the error was constitutional in nature. When an instructional error violates a defendant's right to due process, it may rise to the level of a constitutional error.[1] "A fair trial is a right guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[2]

To prove racketeering, the prosecution must prove that a defendant committed at least two of the enumerated predicate offenses.[3] Here, the amended information identified keeping a house of prostitution and accepting the earnings of a prostitute as the predicate offenses. Thus, to convict defendants of racketeering, the prosecution had to prove that defendants were guilty of both predicate offenses. Accordingly, defen-

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[1] See *People v Cornell*, 466 Mich 335, 372 (2002) (KELLY, J., dissenting), citing *People v Carines*, 460 Mich 750, 761 (1999), and *United States v Gaudin*, 515 US 506 (1995).

[2] *People v Ramsey*, 422 Mich 500, 510 (1985), citing *Drope v Missouri,* 420 US 162 (1975).

[3] MCL 750.159f.

dants could have conceded that they kept a house of prostitution and still not have been convicted of racketeering.

Although defendants did not make that concession, they may not have applied their strongest efforts to prevail on that issue, judging it unnecessary. However, their strategy might have been quite different if, before the jury was instructed, they had had notice that they could have been convicted of keeping a house of prostitution.

I conclude that defendants did not receive a fair trial because they did not have notice that they could be separately convicted of the predicate offense. This deprivation of notice and of a fair trial appears to be a due process violation that rendered the instructional error constitutional in nature.[4]

MARKMAN, J. (*concurring*). Under MCL 768.32, a defendant can only be convicted of an offense that is charged in the indictment or of a necessarily included lesser offense. *People v Cornell,* 466 Mich 335, 353-358 (2002).[1] The indictment here did not charge defendants with keeping a house of prostitution; it only charged defendants with racketeering. Moreover, keeping a house of prostitution is not a necessarily included lesser offense of racketeering because one can commit racketeering without keeping a house of prostitution. *Id*. at 361 (defining necessarily included lesser offense as one in which it is "impossible to commit the greater offense without first committing the [necessarily included lesser] offense").

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[4] The dissent points out that MCR 6.112(H) permits amendment of the information after trial. It suggests that what happened in this case does not warrant constitutional scrutiny if amendment of the information after trial does not warrant constitutional scrutiny. MCR 6.112(H) prohibits amendment of an information when the "amendment would unfairly surprise or prejudice the defendant." This clause protects against due process violations. If an amendment were permitted that unfairly surprised or prejudiced a defendant, the error might also be constitutional in nature. In that case, constitutional scrutiny would apply to the amendment, just as it should apply to the instruction in this case. The dissent appears to agree that error in the amendment of an information and instructional error can rise to the level of constitutional error. Our disagreement is over whether the instructional error in this case unfairly surprised or prejudiced defendants. I conclude that it did. An eleventh hour amendment to the information that adds an offense and a jury instruction that adds an offense have this in common: both occur after the proofs are in, when it is too late for the accused to change his or her trial strategy and produce additional defensive evidence. In this and in most cases the result is prejudice or unfair surprise.

[1] Contrary to the dissent's contention, MCL 768.32 does not say anything about "fair notice of the charges." *Post* at 856 (emphasis omitted).

The original indictment here listed three predicate offenses. The prosecutor was required to prove two of these in order to convict defendants of racketeering. Therefore, defendants could have conceded that they had kept a house of prostitution and still not have been convicted of racketeering. Before trial, the prosecutor amended the information to list only two predicate offenses. However, defendants again could have conceded that they had kept a house of prostitution and not have been convicted of racketeering; the prosecutor still would have been required to prove that defendants committed both of the predicate offenses. Therefore, defendants were not placed on notice that they had to argue that they had not kept a house of prostitution in order to avoid conviction. Indeed, given that the trial court denied the prosecutor's motion to amend the information to directly charge the predicate offenses because the motion was filed after the deadline for the filing of motions had passed, defendants were placed on notice that they were *not* facing separate charges for the predicate offenses.[2]

For these reasons, I concur in the majority's order affirming the Court of Appeals. I also concur in the majority's conclusion that, if harmless-error analysis is applicable, the error here was not harmless. However, I question whether harmless-error analysis is even applicable here. The majority cites two cases in support of this proposition, *Cornell, supra* at 361-362, and *People v Mosko,* 441 Mich 496, 503 (1992). However, the error in those cases was the *failure to instruct* on a necessarily included lesser offense; in this case, the error was to *affirmatively instruct* on an offense that was not a necessarily included lesser offense. That is, in both *Cornell* and *Mosko,* the trial court failed to instruct the jury that it could convict the defendant of a necessarily included lesser offense, while here the court instructed the jury that it could convict defendants of an offense that was not a necessarily included lesser offense.

Harmless-error analysis is applicable to the former error because it is possible that the error was harmless, i.e., even if instructed on the necessarily included lesser offense, the jury might not have convicted the defendant of that offense. However, harmless-error analysis is not applicable to the latter error because I do not believe a situation can be conceived in which such an error would ever be harmless.[3] That is,

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[2] The dissent repeatedly relies on the fact that "MCR 6.112(H) provides that an information may be amended before, during, or after trial." *Post* at 856. However, the fact is that the trial court here denied the prosecutor's motion to amend the information because that motion was not filed on time and the prosecutor never appealed that ruling. Therefore, the issue remains whether defendants can be convicted of an offense that they were never charged with and that does not constitute a necessarily included lesser offense.

[3] Given that I believe that harmless-error analysis is inapplicable here, and that even if it was, the error here was clearly not harmless, I find it unnecessary to address whether the error here was constitutional or nonconstitutional.

whenever the trial court instructs on an offense that is not a necessarily included lesser offense and the jury convicts the defendant of that offense, the error would obviously not be harmless because the jury convicted the defendant of an offense that it should not have even been allowed to consider.[4]

YOUNG, J. I join the statement of Justice MARKMAN.

WEAVER, J. (*dissenting*). I dissent from the order holding that the alleged error is necessarily harmful and I join Justice CORRIGAN's statement. I would grant the Attorney General's application for leave to appeal or remand this case for harmless-error analysis.

CORRIGAN, J. (*dissenting*). I would grant the Attorney General's application for leave to appeal or remand this case for harmless-error analysis. The Court of Appeals reversed defendants' convictions of maintaining a house of ill fame on the ground that it was not a necessarily included lesser offense of racketeering. *People v Martin*, 271 Mich App 280 (2006). Determining whether the offense is necessarily included or separate and distinct, however, is essentially a meaningless exercise in the special circumstances of racketeering prosecutions. The charge of which defendants were convicted *was specifically laid out in the information* as a predicate offense of racketeering. Defendants had explicit notice of the offense of which they were ultimately convicted in the charging document. They vigorously defended against it. Accordingly, any error is harmless.

Racketeering is a unique crime. In order to establish the substantive offense of racketeering, the prosecution must prove at least two specifically enumerated separate offenses,[1] often referred to as "predicate offenses." Proof of these predicate offenses establishes the "pattern of racketeering activity" necessary for a racketeering conviction.[2] When charging a defendant with racketeering, the prosecution must provide the defendant with notice of the specific predicate offenses underlying the racketeering charge.

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[4] The dissent contends that the error was harmless because the prosecutor could have charged and may still charge defendants with keeping a house of prostitution. *Post* at 856 n 7. The error here is that defendants were convicted of a crime without notice that they were facing charges on that crime. The fact that the prosecutor *could* have given them notice or that the prosecutor can give them notice *in a future case* does not alter the fact that they did not have notice in this case. Defendants simply cannot stand convicted of an offense with which they were not charged and that does not constitute a necessarily included lesser offense.

[1] MCL 750.159f.

[2] MCL 750.159i provides that a "person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity."

Here, defendants worked at a topless bar in Belleville. The prosecution charged defendants with racketeering under MCL 750.159i, alleging that dancers at the bar engaged in prostitution in a VIP room and then turned over their earnings to defendants and other managerial employees. The basis of the racketeering charge rested on the predicate offenses of maintaining a house of ill fame, MCL 750.452, and knowingly accepting or receiving the earnings of a prostitute, MCL 750.457. Specifically, the amended information stated:

> 1) On or about various dates from January 1, 1997 through October 25, 2002, in Van Buren Township, Wayne County, Michigan, co-defendants did commit and/or conspired to commit the following offense for financial gain, to wit: did keep, maintain or operate, or aid and abet in keeping, maintaining or operating a house of ill fame, bawdy house or place at 50778 Michigan Avenue, Van Buren Township, resorted to for the purpose of prostitution or lewdness; contrary to MCL 750.452; MSA 28.707.
>
> 2) On or about various dates from 1997 to October 25, 2002, in Van Buren Township, Wayne County, Michigan, co-defendants did commit and/or aid or abet in the commission of the following offense for financial gain, to wit: did knowingly accept, receive, buy or appropriate money or other valuable things without consideration from the earnings of a prostitute, contrary to MCL 750.457; MSA 28.712.[3]

Before trial, the prosecution moved to amend the information to charge these predicate offenses as separate counts.[4] The trial court refused to hear the motion because it was filed after the motion cutoff date in the court's scheduling order. At the close of proofs, the prosecution sought a jury instruction on the predicate offenses as necessarily included lesser offenses. The trial court agreed to so instruct, holding that the predicate offenses were necessarily included lesser offenses of racketeering. In their defenses and again in closing arguments, defendants specifically challenged the elements of each of the two offenses charged as predicate offenses.

The jury acquitted defendants of racketeering, but convicted them of one predicate offense: maintaining a house of ill fame. The Court of Appeals reversed defendants' convictions on the ground that maintaining a house of ill fame was not a necessarily included lesser offense of racketeering. The Attorney General now seeks review in this Court.

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[3] Amended information, dated June 7, 2004.

[4] MCL 750.159j(11) provides the prosecution with the ability to charge and obtain a conviction for both racketeering and the underlying predicate offenses. It states that "[c]riminal penalties under this section are not mutually exclusive and do not preclude the application of any other criminal or civil remedy under this section or any other provision of law."

Regardless of whether the conviction offense is necessarily included in the charged offense, fundamentally, any error on this point is harmless. No due process notice problem arises here because the information afforded specific notice of the offense of which defendants were convicted. Nor is there a multiple punishments problem—defendants were acquitted of all charges but one.

The Court of Appeals analysis overlooked that MCL 768.32[5] protects a defendant from having to defend against a charge without adequate *notice*. That is, the key issue is *whether defendants received fair notice of the charges*.[6] Here, because the information specifically identified the predicate offenses, defendants were notified of the crimes constituting the offense of racketeering.

Moreover, a perverse result arises from the Court of Appeals determinations that (1) the trial court erred by instructing on maintaining a house of ill fame but (2) the prosecution could *now* charge the predicate offense and *begin the case anew*.[7] This resolution compels a new trial even though defendants received specific notice of the predicate offenses.

Finally, MCR 6.112(H) provides that an information may be amended before, during, or after trial "unless the proposed amendment would unfairly surprise or prejudice the defendant." In *People v McGee*, the Court of Appeals held that a trial court may amend the information to add a charge on the day of trial even where no preliminary examination was held because the defendant suffered no prejudice.[8]

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[5] MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

[6] Justice MARKMAN contends that MCL 768.32(1) "does not say anything about 'fair notice of the charges.' " While he is correct that the statute does not contain an explicit statement regarding its purpose, it is clear that the Legislature intended to allow judges and juries to find a defendant guilty of an offense that was not charged as long as the defendant had notice that he would have to defend against the elements of the offense of which he was ultimately convicted. Here, defendants had such notice through the amended information listing the predicate acts that were the basis of the racketeering charges.

[7] Justice MARKMAN overlooks this fact when concluding that any error in instructing that the predicate offenses are necessarily included lesser offenses could never be harmless. As discussed earlier, a prosecutor may charge a defendant for both the substantive offense of racketeering and the predicate offenses. While the prosecution failed to do so here, because it could have done so initially and may still do so, makes the error alleged here all the more *harmless*.

[8] *People v McGee*, 258 Mich App 683, 687 (2003).

Here, the information listed the predicate offenses, and the jury instructions would be identical if the offenses were amended charges or necessarily included lesser offenses. Not only were defendants on notice that they needed to defend against the elements of the predicate offenses, they in fact vigorously contested those offenses at trial. Defendants did not choose to challenge only one of the predicate offenses in order to defeat the racketeering charge. The record reflects that defendants' theory of defense was that they neither maintained a house of ill fame nor knowingly accepted money from a prostitute.

Justices MARKMAN and KELLY contend that although defendants had notice that the predicate offenses were elements of the crime charged, defendants did not specifically know that they could be convicted of those crimes. Because defendants specifically contested the predicate offenses, they understood the possibility of conviction. Moreover, MCR 6.112(H) allows an information to be amended before, during, *or after trial*. When an information is amended after trial, the defendant would not have specific notice that he could be convicted of an added or amended charge. Yet the court rule specifically allows such amendments unless the amendment "would unfairly surprise or prejudice the defendant."[9] This case presents a perfect example of when an amendment to an information *could not* and *did not* unfairly surprise or prejudice the defendant. No miscarriage of justice arose from allowing the jury to consider the predicate offenses because (1) defendants were on notice through the information that specifically set forth the predicate offenses and (2) the parties actually litigated the factual claims presented by all the charged offenses.

Despite this, the Court of Appeals failed to *address* whether the error was harmful. This Court now simply asserts that the error was not harmless. It inexplicably states that "[i]t is not likely that defendants would have been convicted of keeping a house of prostitution had the trial court not instructed the jury that it could be considered as a lesser

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[9] Justice KELLY contends that the trial court committed constitutional error by instructing the jury on the predicate offenses as necessarily included lesser offenses. In *Cornell*, *supra*, this Court held that "harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses." 466 Mich at 361. Moreover, Justice KELLY fails to explain why instructing on predicate offenses as necessarily included lesser offenses would require a stricter standard of review than instances where the trial court allows the prosecution to amend the information after trial to charge predicate offenses separately, authority specifically provided to the court in MCR 6.112(H). MCR 6.112(H) protects a defendant's due process rights by ensuring that an amendment of an information does not "unfairly surprise or prejudice the defendant." I contend that instructing on predicate offenses as necessarily included lesser offenses should be subject to the same standard, i.e., Did the instruction unfairly surprise or prejudice the defendant? Because I conclude that it did not in this case, constitutional inquiry is unnecessary.

included offense of racketeering." Defendants *could not* have been convicted of maintaining a house of ill fame absent a separate charge. But defendants *would have* been convicted of the crime of maintaining a house of ill fame if the trial court had allowed the prosecution to separately charge that predicate offense under MCR 6.112(H). Separately charging defendants with maintaining a house of ill fame, as opposed to merely instructing the jury on it as a necessarily included lesser offense, would have changed nothing about the conduct or outcome of the trial. The evidence that convinced the jury to convict defendants of maintaining a house of ill fame as a necessarily included lesser offense was identical to the evidence that the prosecution would have presented if defendants had been separately charged.

Therefore, I respectfully dissent from the order holding that the alleged error is necessarily harmful. I would grant the Attorney General's application for leave to appeal or remand this case for harmless-error analysis.

Leave to Appeal Denied July 18, 2008:

WRIGHT v WRIGHT, No. 136576; Court of Appeals No. 281918.

ZAVRADINOS v JTRB, INC II, LLC, No. 135137; Court of Appeals No. 268570.

KELLY, J. (*concurring*). I concur with the order denying leave to appeal in this case. The Court of Appeals correctly concluded that plaintiff failed to overcome the presumption that the Proberts hold the securities accounts at issue as tenants by the entirety.

Plaintiff Dimitrios Zavradinos obtained a judgment of $170,000 against defendant Robert Probert. He sought to garnish two of Robert's securities accounts to satisfy the judgment. Robert's wife, Liza Probert, intervened. Liza sought to defeat the garnishment. She argued that she and Robert hold the accounts as tenants by the entirety. Thus, plaintiff cannot garnish the accounts because his judgment is solely against Robert.

Plaintiff offered into evidence internal documents titled "Application Detail Reports." These reports categorize the accounts at issue as "JRS." Following the Proberts' names on the reports is the designation "JTWROS." Both abbreviations stand for the phrase "joint tenants with right of survivorship."

Michigan has adopted a statutory presumption that certain types of personal property owned by spouses are held in tenancies by the entirety.[1] Such property is exempt from execution under a judgment entered against only one of the spouses.[2] The question presented in this case is whether the statutory presumption applies to the property in question.

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[1] MCL 557.151; *DeYoung v Mesler*, 373 Mich 499 (1964).

[2] MCL 600.6023a.

In *DeYoung v Mesler*, judgment creditors of the defendant-husband sought to reach a debenture issued to the defendant and his wife.[3] This Court rejected the creditors' claim.[4] It construed MCL 557.151 to mean that spouses hold a debenture by the entirety unless an intent to do otherwise is affirmatively expressed.[5] In reaching that holding, the Court relied on *Hoyt v Winstanley*.[6]

In *Hoyt*, this Court held that use of the phrase "as joint tenants" coupled with the phrase "husband and wife" in a conveyance does not create a joint tenancy rather than an entireties estate.[7] This is because an estate by the entirety is a form of joint tenancy and the terms are sometimes used interchangeably.[8]

The *Hoyt* Court's reference to spousal language[9] does not imply that, when spousal language is absent, use of the phrase "as joint tenants" suffices to create an estate in joint tenancy. To the contrary, the Court referenced spousal language simply because the conveyance at issue there used spousal language.[10] Its analysis centered on the phrase "joint tenants," not on the spousal language.

Additionally, Michigan caselaw long predating *Hoyt* holds that it is not necessary for a conveyance to use spousal language for courts to presume the existence of a tenancy by the entirety. In 1890, in the case of *Dowling v Salliotte*, the plaintiff argued that a deed that failed to identify the grantees as husband and wife created a tenancy in common, not a joint tenancy.[11] The plaintiff relied on Howell's Stat 5560,[12] which created a presumption in favor of tenancies in common. This Court rejected the plaintiff's argument, citing Howell's Stat 5561.[13] Section 5561 created an exception to the presumption of a tenancy in common when the devise or grant was made to a husband and wife.[14]

The *Dowling* Court reasoned that the exception did not apply to "all grants or devises of land made to persons who are *described* in the

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[3] *DeYoung*, *supra* at 500-501. The debenture read "promises to pay to W. Clark Mesler and Marion Mesler, his wife." *Id*. at 504.

[4] *Id*. at 504-505.

[5] *Id*. at 504.

[6] *Hoyt v Winstanley,* 221 Mich 515 (1922).

[7] *Id*. at 519.

[8] *Id*.

[9] The spousal language in *Hoyt* is "*coupled with husband and wife* in a conveyance to husband and wife." *Id*. at 519 (emphasis added).

[10] The conveyance at issue in *Hoyt* read to "Jasper Winstanley and Elizabeth J. Winstanley, *his wife*, as joint tenants." *Id*. at 516 (emphasis added).

[11] *Dowling v Salliotte*, 83 Mich 131, 132 (1890).

[12] This is a predecessor to MCL 554.44.

[13] This is a predecessor to MCL 554.45.

[14] Howell's Stat 5561.

conveyance as husband and wife."[15] Rather, the Legislature intended that the exception apply when the estate holders were in fact married.[16] "To say that the existence or non-existence of this *fact* must depend upon the recitals in a conveyance would be to substitute form for substance."[17]

The *Dowling* Court's reasoning applies equally here. The statutory presumption in favor of tenancies by the entirety applies when the conveyance is "made payable to persons who *are* husband and wife . . . ."[18] It does not apply to conveyances *describing* the grantees as husband and wife. Thus, as stated by this Court nearly 118 years ago, if "the estate of *both* was created at the same time in one instrument, and they were at the time *in fact* husband and wife, their interest in the land was an entirety . . . ."[19] It is the fact of marriage, not the recitation of marriage, that matters when applying the presumption that an entireties estate exists.[20]

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[15] *Dowling*, *supra* at 133 (emphasis in original).

[16] *Id*.

[17] *Id*. (emphasis in original).

[18] MCL 557.151 (emphasis added).

[19] *Auditor General v Fisher*, 84 Mich 128, 132 (1890) (emphasis in original).

[20] Justice CORRIGAN brushes aside *Auditor General* because it does not address MCL 557.151. The fact that the statutory presumption was not at issue in *Auditor General* is not significant. What is important is that this Court has long rejected the argument that failure to use spousal language in a conveyance controls how the spouses hold the property. See also *Jackson City Bank & Trust Co v Fredrick,* 271 Mich 538, 547 (1935) ("A deed to two parties, who are husband and wife, is sufficient to create a tenancy by the entirety, whether the conveyance itself sets forth they are husband and wife or not."). Justice CORRIGAN similarly brushes aside the statement in *Jackson City Bank* as dictum. But she cannot successfully claim that it is unsupported by earlier caselaw. Moreover, it is a statement on which people have relied in drafting conveyances. It would cause great discombobulation in the field of property law were this Court suddenly to alter this longstanding drafting guide. Additionally, I note that Howell's Stat 5560 and 5561, on which this Court relied in *Dowling,* expressly apply to conveyances of land. The current versions of those statutes also expressly apply to conveyances of land. However, MCL 557.151 makes the types of personal property it lists, when held by spouses, subject to the same treatment as real property held by spouses. As the above-cited caselaw makes clear, the ownership of real estate as tenants by the entirety is not conditioned on the inclusion of spousal language in the conveyance.

In reaching a contrary conclusion, Justice CORRIGAN relies on this Court's opinion in *Murphy v Michigan Trust Co*, 221 Mich 243 (1922). In

The *DeYoung* Court hypothesized that the only way to overcome the presumption in favor of tenancies by the entirety is to "use the words 'not as tenants by the entirety' when such is the intent of the conveyance."[21] This is certainly a clear way to overcome the presumption.

Justice MARKMAN suggests that the presumption was overcome in this case by the indication in the Application Detail Reports that the Proberts hold the accounts as joint tenants with the right of survivorship. He implies that the use of the express "right of survivorship" language is what distinguishes this case from *Hoyt* and *DeYoung*. He relies on the fact that Michigan recognizes both standard joint tenancies and joint tenancies with the full rights of survivorship.[22] He notes that the latter is a joint life estate with dual contingent remainders and is created by the use of express words of survivorship in the granting instrument.[23]

The granting instruments at issue in *Hoyt* and *DeYoung* did not reference the right of survivorship. But more importantly, standard joint tenancies and joint tenancies with the full rights of survivorship both

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Murphy, this Court addressed whether a bank account was held by a couple as joint tenants or tenants by the entirety. The deposit book designated the account as "payable to James E. Murphy and Gertrude Murphy, either or the survivor." *Id*. at 244. This Court concluded that the bank account was held in joint tenancy. *Id*. at 246. Justice CORRIGAN notes that in *Murphy*, this Court found a joint tenancy even though there was no language in the conveyance negating a tenancy by the entirety. She examines the conveyance language in *Hoyt*, *Murphy*, and *DeYoung* and attempts to reconcile them. Her conclusion is that the words "as joint tenants" is insufficient to rebut the presumption in favor of tenancies by the entirety *only* if the conveyance contains spousal language. I reject this conclusion in light of caselaw that expressly provides the contrary. I further note that the result reached in *Murphy* is not at odds with the *Hoyt* analysis. In deciding *Murphy*, this Court considered 1915 CL 8040, a predecessor to MCL 487.703. The statute applied to bank accounts and states that where deposits are made "to either or the survivor of them," such deposits are held in joint tenancy. The Court reasoned that the words "payable to either" did not comport with the idea of a tenancy by the entirety. *Id*. at 245-246. Thus, *Murphy* is distinguishable because it concerned a statute and conveyance language that were not at issue in *Hoyt*.

Finally, even if Justice CORRIGAN's spousal language theory were correct, the Application Detail Reports indicate that Robert is married and that Liza is his spouse. Given the nature of the documents, additional spousal language would have been redundant.

[21] *DeYoung*, *supra* at 503-504.

[22] *Albro v Allen*, 434 Mich 271, 274 (1990).

[23] *Id*. at 275.

entail the right of survivorship. The primary distinction between the two is that the latter may not be converted to a tenancy in common.[24] Tenants by the entirety enjoy the same right of survivorship as joint tenants.[25] A tenancy by the entirety is simply a joint tenancy "plus the unity of the marital relation."[26] Standard joint tenancies, joint tenancies with full rights of survivorship, and tenancies by the entirety are all forms of joint tenancy.[27] Thus, for the same reason that the designation "as joint tenants" was insufficient to create a standard joint tenancy in *Hoyt*, the designation "JTWROS" is insufficient to create a joint tenancy here.[28]

In support of his position, Justice MARKMAN describes an account application form containing a place where the Proberts could have expressed their desire to hold their investment as tenants by the entirety. That form pertains solely to an account of the Proberts that has no funds. Thus, it is not at issue. Janet Kemp, a Salomon Smith Barney employee, testified that she, not the Proberts, filled out the form on the basis of an oral interview with them. Kemp did not testify that the Proberts directed her to designate the investment as owned by joint tenants with rights of survivorship instead of as tenants by the entirety. Nor was there any testimony from the Proberts in this regard. Thus, there is nothing to show that the Proberts specifically chose to hold as joint tenants instead of as tenants by the entirety. Kemp also testified that the Proberts did not sign the application.[29]

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[24] *Id*.

[25] *United States v Craft*, 535 US 274, 281 (2002).

[26] *Hoyt*, *supra* at 518.

[27] *Hoyt*, *supra* at 518 (concerning standard joint tenancies and estates by the entirety); *Albro*, *supra* at 274 (concerning standard joint tenancies and joint tenancies with full rights of survivorship).

[28] Contrary to Justice MARKMAN's assertion, the Court of Appeals did not convert one type of estate into a different one. Rather, the Court of Appeals relied on existing caselaw to conclude that the presumption of an estate by the entirety was not overcome. The Court of Appeals did nothing to alter how the Proberts hold their property. Nor, as Justice MARKMAN suggests, did the Court of Appeals eliminate the distinction between a standard joint tenancy and a joint tenancy with full rights of survivorship. Both types of estates can be created by the use of appropriate language. To properly create either one, however, the statutory presumption of an estate by the entirety must be overcome. To overcome it, very explicit language must be used. The judgment of the Court of Appeals is consistent with that rule of law. It is not "absurd," as Justice MARKMAN contends, to apply this longstanding rule of law. Rather, it would be absurd to abandon it.

[29] There was some suggestion that the application might have been part of a larger packet of documents signed by the Proberts.

Under the circumstances, I agree with the Court of Appeals that

> for plaintiff to prevail, we would have to conclude that a form that may or may not have been signed by the account holders that selects a joint tenancy rather than a tenancy by the entirety for a different account at the same financial institution meets the statutory standard of expressly providing for a form of ownership other than as tenants by the entirety. We cannot make that leap of logic. The possible expression of an intent for one account simply does not expressly provide an intent for a different account.[30]

Entireties ownership of property is a modified form of joint tenancy. In reliance on *Hoyt* and *DeYoung*, the designations "JTWROS" and "JRS" are insufficient to overcome the statutory presumption in favor of a tenancy by the entirety. The Court of Appeals properly applied longstanding Michigan caselaw in reaching its decision. A reversal of the Court of Appeals judgment would upset significant reliance interests. Accordingly, I concur in the denial of leave to appeal.

CAVANAGH, J. (*dissenting*). I would reverse the Court of Appeals and reinstate the trial court's holding because the defendants' actions evidenced the requisite intent to rebut the presumption in favor of tenancies by the entirety. Hence, defendants' accounts were not protected by MCL 600.6023a.

CORRIGAN, J. (*dissenting*). I dissent from the order denying leave to appeal. I would reverse the judgment of the Court of Appeals, reinstate the trial court's ruling that the Proberts held the brokerage accounts as joint tenants with rights of survivorship, and remand the case to the Court of Appeals for consideration of what portion of the accounts are subject to garnishment. I interpret *DeYoung v Mesler*, 373 Mich 499 (1964), to mean that the words "as joint tenants" do not rebut the presumption in favor of a tenancy by the entirety *when the conveyance includes language indicating that the title holders are married* (spousal language). Here, the accounts state that the Proberts hold the accounts as "JTWROS" (joint tenants with rights of survivorship). Because the accounts do not include spousal language indicating that the Proberts hold the accounts "as husband and wife," they hold the accounts as joint tenants with rights of survivorship. The Court of Appeals incorrectly interpreted dicta from *DeYoung* to require the conclusion that the Proberts held the accounts as tenants by the entirety because the accounts did not specifically state "not as tenants by the entirety."

I. FACTS AND PROCEDURAL POSTURE

In the underlying case, plaintiff was awarded a judgment of $170,000 against defendant Robert Probert. Plaintiff later learned that Robert and

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[30] *Zavradinos v JTRB, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2007 (Docket No. 268570), at 2.

his wife, Liza Probert, had two brokerage accounts at Salomon Smith Barney holding $160,000 in assets. Plaintiff sought to garnish these accounts. The Proberts moved to set aside the garnishment, claiming that the accounts were not subject to garnishment against Robert alone, because the Proberts held the accounts together as tenants by the entirety. Plaintiff responded that the accounts were subject to garnishment because the statutory presumption that married couples hold title as tenants by the entirety was rebutted by evidence that the Proberts established the accounts as joint tenants with rights of survivorship.

The trial court held an evidentiary hearing to determine whether the evidence was sufficient to rebut the statutory presumption that the Proberts held the accounts as tenants by the entirety. At the hearing, the Proberts' financial consultant at Salomon Smith Barney testified that the Proberts had set up the accounts as joint tenants with rights of survivorship. She testified that if they had wished to set up the accounts as tenants by the entirety, they could have done so. The application detail reports for the accounts state that the accounts are held by the Proberts as "JTWROS." Liza testified that she was a homemaker and earned no income. She had not personally contributed any money to the accounts. Rather, Robert, who had an annual salary of $1.5 million, had contributed all the money in the accounts.

The trial court denied the Proberts' motion to set aside the garnishment. The court held that the application detail reports and the testimony of the Salomon Smith Barney financial consultant established that the Proberts held the accounts as joint tenants with rights of survivorship. The court held that this evidence was sufficient to overcome the statutory presumption of tenancy by the entirety. Because the Proberts held the accounts as joint tenants with rights of survivorship, Robert's interest was severable and subject to garnishment. The court then held that because Liza had not contributed any money to the accounts, Robert owned all of the money, so all of the funds in the accounts were available to satisfy plaintiff's garnishment against Robert.

The Court of Appeals reversed in a split opinion. The majority held that under *DeYoung, supra* at 503-504, even listing the husband and wife as "joint tenants" is insufficient to create an ordinary joint tenancy rather than a tenancy by the entirety. "*DeYoung* makes it clear that a conveyance to a husband and wife as joint tenants is insufficient to defeat the presumption in favor of a tenancy by the entirety because a tenancy by the entirety is a form of joint tenancy." *Zavradinos v JTRB, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2007 (Docket No. 268570), p 3. The majority held that because the Proberts' accounts listed them as joint tenants but did not say "not as tenants by the entirety," the accounts must be treated as being held as tenants by the entirety.

Judge FITZGERALD dissented. He opined that under *In re VanConett Estate*, 262 Mich App 660 (2004), overcoming the statutory presumption of tenancy by the entirety does not require the accounts to clearly state "not as tenants by the entirety." He opined:

> In light of th[e] evidence, the trial court's findings that the Proberts opened the accounts as joint tenants with rights of survivorship and that the Proberts intended to create an estate other than an estate by the entireties is not clearly erroneous. Plaintiff rebutted the presumption of a tenancy by the entirety by evidence demonstrating the Proberts' express intent to establish the investment accounts as joint tenants with rights of survivorship. [*Zavradinos, supra* at 2 (FITZGERALD, J., dissenting).]

Judge FITZGERALD concluded that because the Proberts held the accounts as joint tenants, Robert's interest was severable and subject to garnishment. Judge FITZGERALD then stated that the trial court did not clearly err in finding that all of the funds in the accounts belonged to Robert and were subject to garnishment because Liza had not contributed any money to the accounts.

Plaintiff appealed. This Court ordered the parties to file supplemental briefs addressing the following issues:

> (1) whether *DeYoung v Mesler,* 373 Mich 499 (1964), correctly construed MCL 557.151 to mean that there is a statutory presumption that property held jointly by a husband and wife is held by them as tenants by the entirety unless the title or conveyance expressly provides otherwise, (2) if so, how the presumption of a tenancy by the entirety may be overcome, and (3) whether a provision in the title or conveyance specifically identifying the property owners as husband and wife affects the determination whether the presumption of a tenancy by the entirety has been overcome. [480 Mich 1080 (2008).]

II. STANDARD OF REVIEW

This case involves the interpretation of MCL 557.151. "Questions of statutory interpretation are reviewed de novo." *Ayar v Foodland Distributors*, 472 Mich 713, 715 (2005). "Clear and unambiguous statutory language is given its plain meaning, and is enforced as written." *Id.* at 716.

III. LEGAL BACKGROUND

MCL 600.6023a provides: "Property described in . . . MCL 557.151, or real property, held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment entered against only 1 spouse." The parties do not dispute that the Proberts' accounts fall within the categories of property listed in MCL 557.151. The parties also do not dispute that if the Proberts hold the accounts as tenants by the

entirety, the accounts are not subject to garnishment pursuant to MCL 600.6023a. Thus, the question is whether the Proberts held property described in MCL 557.151 as tenants by the entirety.

MCL 557.151 provides:

> All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

It appears well-established under this Court's caselaw that under MCL 557.151, there is a statutory presumption that property listed in the statute that is held jointly by a husband and wife is held by them as tenants by the entirety unless that presumption is rebutted by an express provision indicating otherwise. *DeYoung*, *supra* at 503-504. Three cases from this Court have discussed the language required to create a joint tenancy rather than a tenancy by the entirety.

In *Murphy v Michigan Trust Co*, 221 Mich 243, 244 (1922), the plaintiffs, a married couple, deposited money in the defendant bank in a joint account under their names. Plaintiffs had their savings designated in their deposit book as "payable to James E. Murphy and Gertrude Murphy, either or the survivor." *Id.* James was a partner in the bank, so when the bank failed, he was not entitled to recover money from an account that belonged to him personally until the bank creditors had been paid, unless the money in the account also belonged to Gertrude. *Id.* at 245. This Court rejected the plaintiffs' argument that they held the accounts as tenants by the entirety:

> It is true that such incident of unity of person is the only addition to a joint tenancy necessary to create a tenancy by entireties. But even where the unity of person exists a joint tenancy may be created. Under the terms of the deposits were plaintiffs each seized of an undivided moiety of the whole or by entireties? The words "payable to either" do not square with the idea of a tenancy by entireties but do pointedly relate to a joint tenancy. If plaintiffs held the deposits as tenants by entireties the same could not be paid to either during the lifetime of both, but if they held as joint tenants the deposits were "payable to either." [*Id.* at 245-246.]

This Court concluded that under the predecessor to MCL 487.703,[1] the plaintiffs held the deposits as joint tenants, so James's half portion was severable for the purpose of meeting the creditors' demands. *Id*. at 246.

In *Hoyt v Winstanley*, 221 Mich 515, 516 (1922), this Court considered real estate conveyed to "Jasper Winstanley and Elizabeth J. Winstanley, his wife, as joint tenants." One of the issues was whether the Winstanleys took the realty as a tenancy by the entirety or as joint tenants. *Id*. at 517. This Court explained that "[a]t common law a conveyance to husband and wife gave to them a tenancy by entirety." *Id.* A husband and wife, however, can hold an estate as joint tenants or tenants in common "if sufficiently described as such in the deed." *Id.* This Court described the nature of joint tenancies and tenancies by the entirety as follows:

> The explanatory words, "as joint tenants," would of themselves be sufficient to indicate that an estate in joint tenancy was intended to be conveyed were it not for the fact that an estate by the entirety is a species of joint tenancy and is commonly included in that class. We have held that a grant to a husband and wife jointly conveyed an estate in entirety. The same word "jointly" used in a conveyance to grantees not husband and wife conveys an estate in joint tenancy. So, too, the words "joint tenants," when coupled with "husband and wife," do not bear the ordinary meaning, for an estate by the entirety is a joint tenancy. It is an estate in joint tenancy plus the unity of the marital relation. At common law and in our statutes, estates by the entirety are regarded as a modified form of joint tenancy. [*Id.* at 518.]

This Court then held that the words "as joint tenants," coupled with husband and wife, was insufficient to rebut the presumption that a tenancy by the entirety was intended:

> In view of the fact that estates by entirety are a modified form of joint tenancy, that the terms are sometimes used interchangeably, and that our statute treats them as a species of joint tenancy,

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[1] 1915 CL 8040 provided:

> When a deposit shall be made in any bank or trust company by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of one of them.

> it is my judgment that the words "as joint tenants," coupled with husband and wife in a conveyance to husband and wife, are not sufficient to indicate that an estate in joint tenancy was intended to be conveyed. To create an estate in joint tenancy in a conveyance to a husband and wife, the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended. [*Id.* at 519.]

Thus, this Court concluded that the deed to "Jasper Winstanley and his wife as joint tenants" conveyed a tenancy by the entirety. *Id.* at 520.

In *DeYoung*, the plaintiffs, judgment creditors of the defendant husband, sought to reach a debenture issued to the defendants, a married couple, in both of their names. The debenture stated that the debtor "promises to pay to W. Clark Mesler and Marion Mesler, his wife." *DeYoung*, *supra* at 504. The issue was whether under MCL 557.151, the debenture created a joint tenancy or a tenancy by the entirety. This Court first stated that it recognized that, "irrespective of presumptions to the contrary, real property in this State *can* be held by husband and wife as joint tenants when a clear intent to create a joint tenancy occurs." *Id.* at 502-503. This Court quoted the language in *Hoyt* explaining that a tenancy by the entirety is a form of joint tenancy, and that " 'the words "as joint tenants," coupled with husband and wife in a conveyance to husband and wife, are not sufficient to indicate that an estate in joint tenancy was intended to be conveyed.' " *Id.* at 503, quoting *Hoyt, supra* at 519. The *DeYoung* Court then stated that *Hoyt*

> appears to require that in order not to create a tenancy by the entirety in realty conveyed to husband and wife, even the use of the words "as joint tenants" is insufficient. The only alternative seems to be to use the words "not as tenants by the entirety" when such is the intent of the conveyance. [*DeYoung, supra* at 503-504.]

This Court, applying *Hoyt*'s test to MCL 557.151, held that an estate by the entirety is created "unless an intent to do otherwise is affirmatively expressed." *Id.* at 504. The *DeYoung* Court then adopted the following holding from the Court of Appeals for the Sixth Circuit:

> "In Michigan, the common-law rule that a conveyance to husband and wife creates a tenancy by the entirety has persisted except in respect to conveyances explicitly indicating that some other kind of tenancy is intended. Even the qualifying phrase 'as joint tenants,' while sufficient to create a joint tenancy in a conveyance to grantees generally, does not avoid the creation of an estate by the entirety when the grantees stand in the marital relation to each other." [*Id.* at 504, quoting *Internal Revenue Comm'r v Hart*, 76 F2d 864, 865 (CA 6, 1935).]

This Court then stated that it was constrained to hold that the language of MCL 557.151 indicates a legislative intent that the defendants held the

debenture as tenants by the entirety. *DeYoung, supra* at 504-505. Therefore, the plaintiffs could not reach the defendant husband's nonseverable interest in the debenture. *Id.* at 504-505. Justice SOURIS dissented. He opined that MCL 557.151 created a presumption in favor of a joint tenancy, not a tenancy by the entirety.

More recently, the Court of Appeals considered a conveyance of real property to a husband and wife in *In re VanConett Estate*. In *VanConett, supra* at 662, Herbert VanConett sought to dispose of real property following the death of his wife, Ila VanConett, under a mutual will made pursuant to a contract to make a will. The deed conveyed the property to "HERBERT L. VANCONETT, ILA R. VANCONETT and FLORENCE H. VANCONETT as joint tenants with full rights of survivorship and not as tenants in common." *Id.* at 667. The Court of Appeals held that the plaintiff estate had standing to bring an action to recover the real property because the VanConetts held the property as joint tenants with rights of survivorship rather than tenants by the entirety, so the property passed within Ira's will. *Id.* at 666-667. The Court of Appeals held that the VanConetts held the property as joint tenants with rights of survivorship because the deed contained explicit language overcoming the presumption of a tenancy by the entirety:

> In a tenancy by the entireties, a husband and wife hold joint title to real property with right of survivorship. *Lilly v Schmock*, 297 Mich 513, 517; 298 NW 116 (1941). A deed or devise of real property to a husband and wife presumptively creates a tenancy by the entireties, MCL 554.44, 554.45, but this presumption may be overcome by explicit language in the deed. *DeYoung v Mesler*, 373 Mich 499, 503-504; 130 NW2d 38 (1964). When the VanConetts took title to the property, the deed conveyed the land to "HERBERT L. VANCONETT, ILA R. VANCONETT and FLORENCE H. VANCONETT as joint tenants with full rights of survivorship and not as tenants in common." Because explicit language was used, a tenancy by the entireties was not created between Herbert and Ila, and all three held the property as joint tenants with full rights of survivorship. [*VanConett, supra* at 667.]

IV. ANALYSIS

Plaintiff argues that the Court of Appeals erred by interpreting *DeYoung* to mean that when property is conveyed to a married couple, using the words "as joint tenants" will create a tenancy by the entirety unless the conveyance also includes express language saying "not as tenants by the entirety." Although I think that the Court of Appeals interpretation of *DeYoung* is reasonable, I agree with plaintiff that this is not the best interpretation of *DeYoung*.

In both *Hoyt, supra* at 517, and *DeYoung, supra* at 504, this Court held that a conveyance to a husband and wife creates a tenancy by the entirety

unless an intent to do otherwise is clearly expressed. The United States Court of Appeals for the Sixth Circuit explained that Michigan's common-law rule, which is unchanged by statute, is as follows: " 'While a conveyance or devise to a husband and wife ordinarily creates a tenancy by entireties, an intention clearly expresses that they shall take as tenants in common, or as joint tenants, is effective.' " *Guldager v United States*, 204 F2d 487, 488 (CA 6, 1953), quoting Tiffany, Real Property (1940), § 290.

In *DeYoung*, this Court quoted the holding in *Hoyt* that " 'the words "as joint tenants," *coupled with husband and wife* in a conveyance to husband and wife, are not sufficient to indicate that an estate in joint tenancy was intended to be conveyed.' " *DeYoung, supra* at 503, quoting *Hoyt, supra* at 519 (emphasis added). The *DeYoung* Court interpreted *Hoyt* to mean that "in order not to create a tenancy by the entirety in realty conveyed *to husband and wife*, even the use of the words 'as joint tenants' is insufficient." *DeYoung, supra* at 503 (emphasis added). In both *Hoyt* and *DeYoung*, the conveyances included spousal language indicating that the property was conveyed to the married couple together as husband and wife. The *Hoyt* and *DeYoung* courts appear to have conditioned their statements, that the words "as joint tenants" are insufficient to rebut the presumption in favor of a tenancy by the entirety, on the use of such spousal language. *Murphy* supports this conclusion. In *Murphy*, the married couple's bank deposit book did *not* include spousal language, and, although the deposit book did not specifically state "not as tenants by the entirety," this Court nonetheless held that the conveyance created a joint tenancy rather than a tenancy by the entirety.[2]

In light of these opinions, *DeYoung* is best interpreted to mean that the words "as joint tenants" is insufficient to rebut the presumption in favor of a tenancy by the entirety *if the conveyance contains spousal language* such as "husband and wife" or "his wife." In other words, when property is held by a husband and wife "as joint tenants with rights of survivorship," if spousal language indicating that the title holders are married is included in the conveyance or designation of title, the use of the seemingly contrary phrase "as joint tenants with rights of survivorship" is not in and of itself sufficient to defeat the presumption that the conveyance or designation of title intended a tenancy by the entirety. If

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[2] *Murphy* involved the predecessor of MCL 487.703, which specifically applied to certain types of bank deposits involving more than one person (including married couples) and provided that such deposits "shall become the property of such persons as joint tenants . . . ." 1915 CL 8040. Similarly, MCL 557.151 provides that the listed types of personalty "shall be held by such husband and wife in joint tenancy . . . ." Therefore, *Murphy*'s holding, although distinguishable because it applies to a different statute, is helpful in resolving whether property held by a married couple under MCL 557.151 is held in joint tenancy or tenancy by the entirety.

the conveyance uses spousal language, then, according to *DeYoung*, the only way to way to rebut the presumption in favor of a tenancy would be to include the words "not as tenants by the entirety." When the conveyance uses the words "as joint tenants with rights of survivorship" and does not contain spousal language, however, the words "not as tenants by the entirety" are *not* necessary to create a joint tenancy with rights of survivorship. This interpretation is supported by the Court of Appeals' observation that the use of spousal language indicates an intent to convey as tenants by the entirety. See *Butler v Butler*, 122 Mich App 361, 368 (1983) ("[T]he plaintiff and defendant were husband and wife when the deeds were created. . . . [T]he deeds used the designation 'his wife' in referring to plaintiff. Such designation indicates an intent to take as tenants by the entireties.").[3]

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[3] Defendants point out that in *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 547 (1935), this Court stated, "A deed to two parties, who are husband and wife, is sufficient to create a tenancy by the entireties, whether the conveyance itself sets forth they are husband and wife or not." This statement, however, could be interpreted to mean merely that spousal language is not always *required* to create a tenancy by the entirety. It does not necessarily mean that spousal language is irrelevant in determining whether a joint tenancy or a tenancy by the entirety has been created. "[E]ven where the unity of person exists a joint tenancy may be created." *Murphy, supra* at 245. Further, this statement from *Jackson City Bank* is dictum. In *Jackson City Bank, supra* at 547, the deed conveyed the property to the couple "as husband and wife" and "as tenants by the entireties," with "rights of survivorship." The problem was that the couple was not legally married. *Id.* at 542. This Court held that the intent of the deed was to create a joint tenancy with a right of survivorship. *Id.* at 547-548. The Court held that because the parties were not legally married, it was irrelevant that the deed provided that a tenancy by the entirety was created. *Id.* Because the deed in *Jackson City Bank* contained spousal language and this Court held that the deed conveyed a joint tenancy, this Court's statement that a tenancy by the entirety may be created without spousal language is nonbinding dictum.

Justice KELLY erroneously cites *Dowling v Salliotte*, 83 Mich 131 (1890), for the proposition that the use of spousal language is irrelevant in determining whether the presumption in favor of a tenancy by the entirety has been rebutted. In *Dowling, supra* at 133, this Court held that under Howell's Stat 5560 and 5561, a deed conveyed property to a married couple as joint tenants rather than as tenants in common, despite the absence of spousal language in the deed. The Court's holding does not support Justice KELLY's argument for three reasons. First, *Dowling* did not even involve a tenancy by the entirety because the *Dowling* Court observed that "estates in entirety were abolished in this State by the statute of 1846 . . . ." *Id.* at 135. Second, the *Dowling*

This conclusion is also consistent with the Court of Appeals holding in *VanConett*. In *VanConett, supra* at 667, the conveyance used the words "as joint tenants with full rights of survivorship" and did not use spousal language. The Court of Appeals held that the language "as joint tenants" was sufficiently explicit to rebut the presumption in favor of a tenancy by the entirety. This holding is consistent with my conclusion that the words "as joint tenants with rights of survivorship" can rebut the presumption in favor of a tenancy by the entirety when the conveyance does not include spousal language. For the reasons stated in Justice MARKMAN's dissenting statement, I agree that the Court of Appeals' bases for distinguishing *VanConett* are misplaced.[4]

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holding is based entirely on the language of Howell's Stat 5560 and 5561. Howell's Stat 5560 provided: "All grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." Howell's Stat 5561 provided: "The preceding section shall not apply to . . . devises or grants made . . . to husband and wife." The *Dowling* Court held that the husband and wife took as joint tenants because the "statute does not provide that in all grants and devises of land made to persons who are *described* in the conveyance as husband and wife they shall take as joint tenants." *Dowling*, *supra* at 133 (emphasis in original). This correct holding is based on the unambiguous language of Howell's Stat 5560 and 5561, which are inapplicable to this case. Third, *Dowling* is distinguishable because it did not discuss the language necessary to rebut the statutory presumption in favor of a tenancy in common. The deed in *Dowling* did not contain language expressly stating that the couple took the property as tenants in common rather than as joint tenants, whereas the detail application reports in this case specifically state that the Proberts took the accounts as joint tenants with rights of survivorship rather than as tenants by the entirety.

The other case Justice KELLY cites, *Auditor General v Fisher*, 84 Mich 128 (1890), also does not support her position. In that case, this Court held that the husband and wife held real property as tenants by the entirety even though the land contract did not expressly state that they were married. *Id.* at 132. *Auditor General* has nothing to do with the statute in the present case. Further, it did not discuss what language is sufficient to rebut a presumption in favor of a tenancy by the entirety. *Auditor General* merely explained that a married couple who do not specify how they hold property hold the property as tenants by the entirety, despite the lack of spousal language. This holding is entirely consistent with my position in this case.

[4] Justice KELLY fails to reconcile the Court of Appeals decision in this case with *VanConett*. Under *VanConett*, the words "as joint tenants with

Further, the Court of Appeals interpretation of *DeYoung* seems inconsistent with principles of "plain language" and "right to contract." The inclusion of the words "as joint tenants with rights of survivorship," without spousal language, should mean that the couple takes the property as joint tenants with rights of survivorship. The Court of Appeals holding that married couples who state on their form of ownership that they hold the property "as joint tenants with rights of survivorship" do not hold the property as joint tenants with rights of survivorship, but instead hold the property as tenants by the entirety, seems contrary to the plain language of the document and the parties' right to contract as they see fit.[5] Most married couples will not know that if they want a joint tenancy with rights of survivorship, they must expressly state on the form that they do not hold the property as tenants by the entirety. This is especially true because married couples such as the Proberts frequently complete preprinted forms designating the form of ownership. It is unrealistic to expect married couples who want to create a joint tenancy with rights of survivorship to write by hand "not as tenants by the entirety" on a preprinted form that already uses the words "as joint tenants with rights of survivorship."

Additionally, I agree with plaintiff that *DeYoung*'s statement that the words "as joint tenants" are insufficient to rebut the statutory presumption in favor of a tenancy by the entirety is dictum. The conveyance in *DeYoung*, unlike the conveyance in the instant case, did not include "as joint tenants with rights of survivorship" language. Rather, the conveyance in *DeYoung* merely stated, "to W. Clark Mesler and Marion Mesler, his wife." Therefore, it was unnecessary for the *DeYoung* Court to address whether the words "as joint tenants" are sufficient to rebut the presumption in favor of a tenancy by the entirety. For similar reasons, it was also unnecessary for the *DeYoung* Court to state that the only way to rebut the presumption is to state "not as tenants by the entirety." "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Roberts v Auto-Owners Ins Co,* 422 Mich 594, 597-598 (1985). In order to resolve the *DeYoung* case, it was necessary for this Court to hold that under MCL 557.151 a conveyance that uses spousal language and does

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full rights of survivorship" were sufficient to rebut the presumption that a tenancy by the entirety was created. *VanConett*, *supra* at 667. If the majority thinks that *VanConett* was incorrectly decided, it should grant leave to appeal so that it can overrule that decision. Until that time, the *VanConett* decision remains binding on the Court of Appeals. MCR 7.215(J)(1).

[5] In *Lober v Dorgan*, 215 Mich 62, 64 (1921), this Court stated:

> The parties themselves have provided for survivorship by agreement. The parties having so contracted, is there any valid reason why we should refuse to enforce their agreement? Our statute does not prohibit such a contract. There is nothing in the agreement which is immoral or against the public good.

not specify the type of estate it intends to convey is presumed to convey a tenancy by the entirety. The *DeYoung* Court's other statements going beyond this essential holding were dicta.

V. APPLICATION

In this case, the application detail reports did not use spousal language referring to the Proberts "as husband and wife." Rather, the reports merely stated: "Robert Alan Probert and Liza Danielle Probert JTWROS." Although the "profile information" later in the reports states that Robert is married, this is not the type of spousal language involved in *DeYoung* that indicates an intent to create a tenancy by the entirety. Therefore, I do not think that the *DeYoung* dicta apply in this case. The application detail reports expressly state that the Proberts hold the accounts as joint tenants with rights of survivorship. This language indicates a clear intention to create a joint tenancy with rights of survivorship. See *DeYoung, supra* at 503 (holding that a married couple can hold property "as joint tenants when a clear intent to create a joint tenancy occurs"). Although the language "JTWROS" might not be sufficient under *DeYoung*'s dicta to rebut the presumption in favor of a tenancy by the entirety *when the conveyance uses spousal language*, I think that this clear language intending to create a joint tenancy with rights of survivorship *is* sufficient to rebut the presumption in cases like this when the conveyance does not use spousal language. See *VanConett, supra* at 667.

VI. CONCLUSION

Because the application detail reports do not use spousal language and state that the Proberts held the accounts as "JTWROS," I would hold that the Proberts held the accounts as joint tenants with rights of survivorship. I would reverse the Court of Appeals on this issue and remand the case to the Court of Appeals for plenary consideration of whether the trial court clearly erred in finding that plaintiff rebutted the presumption that the Proberts owned equal parts of the accounts.

MARKMAN, J. (*dissenting*). I would reverse the judgment of the Court of Appeals and reinstate the trial court's ruling that the brokerage accounts in this case were held as joint tenancies with rights of survivorship and, therefore, were not subject to the terms of MCL 600.6023a.

Plaintiff, Dimitrios Zavradinos, was awarded a judgment of $170,000 against defendant, Robert Probert. Zavradinos sought to garnish two brokerage accounts that Probert had at Salomon Smith Barney, and Probert's wife, Liza Probert, intervened, claiming that the accounts were not subject to garnishment because they were held as tenancies by the entirety. It is undisputed that Liza has no income and did not contribute money to either account. At the time the accounts were opened, Robert was a professional hockey player earning $1.5 million annually.

When the Proberts first applied for an account at Salomon Smith Barney, the application form contained different check boxes for different

types of accounts, and the Proberts selected "JRS" and left "ENT" blank.[1] Three subsequent accounts, two of which are the accounts at issue in this case, were also designated "JRS" on the application detail reports. In addition, under the "name" column, the account owners were listed as "Robert Alan Probert and Liza Danielle Probert JTWROS." Farther down on the forms, Liza was designated as Robert's spouse. Janet Kemp, who partially managed the account, testified that "JRS" and "JTWROS" both mean "joint tenants with rights of survivorship" and that "ENT" means "tenancy by the entirety." Kemp also testified that the Proberts set up the accounts as joint tenants with rights of survivorship, that the accounts had been treated as such, and that the Proberts alternatively could have set up the accounts as tenants by the entirety. The trial court allowed Zavradinos to garnish the accounts, holding that the accounts were held as joint tenancies with rights of survivorship and not as tenancies by the entirety. The trial court also ruled that Robert owned all the money in the accounts and, therefore, that all the funds were available to satisfy Zavradinos's judgment.

The Court of Appeals reversed, holding that the only way to overcome the presumption of a tenancy by the entirety when property is held by a married couple is to use the words "not as tenants by the entirety." Judge FITZGERALD dissented, stating that he would not require such an explicit disclaimer.

MCL 557.151 provides:

> All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

MCL 600.6023a provides:

> Property described in section 1 of 1927 PA 212, MCL 557.151, or real property, held jointly by a husband and wife as a tenancy by the entirety is exempt from execution under a judgment entered against only 1 spouse.

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[1] This account had been closed, so it was not subject to garnishment. It is unclear from the record whether this form was part of the larger application signed by the Proberts. The form was used as an exhibit to show how the Proberts elected to set up the first account, and three subsequent accounts, and demonstrates the different classifications that Salomon Smith Barney used for different types of accounts.

The parties do not dispute that the two accounts in question fall within the property described in MCL 557.151, so if the accounts are held as tenancies by the entirety, they are exempt from garnishment for the judgment against Robert.

In *Hoyt v Winstanley*, 221 Mich 515, 516 (1922),[2] land was conveyed to " 'Jasper Winstanley and Elizabeth J. Winstanley, his wife, as joint tenants.' " The Court stated:

> In this State, where the common-law rule is unchanged by statute, a conveyance to husband and wife conveys an estate in entirety, but may create one in joint tenancy or in common, if explicitly so stated in the deed. The question then in the case under consideration is the construction to be placed on the language of the deed to "Jasper Winstanley and wife as joint tenants." To "Jasper Winstanley and wife" conveys an estate by the entirety. The explanatory words, "as joint tenants," would of themselves be sufficient to indicate that an estate in joint tenancy was intended to be conveyed were it not for the fact that an estate by the entirety is a species of joint tenancy and is commonly included in that class. We have held that a grant to a husband and wife jointly conveyed an estate in entirety. The same word "jointly" used in a conveyance to grantees not husband and wife conveys an estate in joint tenancy. So, too, the words "joint tenants," when coupled with "husband and wife," do not bear the ordinary meaning, for an estate by the entirety is a joint tenancy. It is an estate in joint tenancy plus the unity of the marital relation. At common law and in our statutes, estates by the entirety are regarded as a modified form of joint tenancy. . . .
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> . . . To create an estate in joint tenancy in a conveyance to a husband and wife, the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended. [*Id*. at 518-519.]

In *DeYoung v Mesler*, 373 Mich 499, 503 (1964), the Court noted that, under *Hoyt*, the language "as joint tenants" was not sufficient to defeat the creation of a tenancy by the entirety in realty conveyed to a husband and wife. The Court further stated: "The only alternative seems to be to use the words 'not as tenants by the entirety' when such is the intent of the conveyance." *Id*. at 503-504. The Court applied this reasoning to MCL 557.151 and held that the statute created a presumption that a

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[2] *Hoyt* predates MCL 557.151, which was enacted in 1927. However, later cases that interpret MCL 557.151 refer to *Hoyt*.

tenancy by the entirety was created "unless an intent to do otherwise is affirmatively expressed." *Id*. at 504.

The question here is whether the presumption that the accounts were held as tenancies by the entirety was overcome by a sufficiently express provision that created a different type of estate. In *In re VanConett Estate*, 262 Mich App 660, 664 (2004), a married couple, Herbert and Ila VanConett, had executed mutual wills pursuant to a contract. The wills provided that "the surviving spouse's will would become irrevocable at the first spouse's death." The Court of Appeals reversed the probate court's finding that the real property at issue was held by the VanConetts as a tenancy by the entirety, stating:

> A deed or devise of real property to a husband and wife presumptively creates a tenancy by the entireties, MCL 554.44, 554.45, but this presumption may be overcome by explicit language in the deed. *DeYoung v Mesler*, 373 Mich 499, 503-504; 130 NW2d 38 (1964). When the VanConetts took title to the property, the deed conveyed the land to "HERBERT L. VANCONETT, ILA R. VANCONETT and FLORENCE H. VANCONETT as joint tenants with full rights of survivorship and not as tenants in common." Because explicit language was used, a tenancy by the entireties was not created between Herbert and Ila, and all three held the property as joint tenants with full rights of survivorship.[1]
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> [1] We do not mean to [imply] by our statement, which is specific to the facts of this case, that a joint tenancy cannot be created between a married couple holding property as tenants by the entireties and a joint tenant. MCL 554.44; MCL 554.45; see *Fullagar v Stockdale*, 138 Mich 363; 101 NW 576 (1904).
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> [*Id*. at 667.]

The Court of Appeals determined that, upon Florence's death, the property passed to Herbert and Ila as "joint tenants with full rights of survivorship," and, upon Ila's death, the property passed to Herbert outside Ila's will. *Id*. at 667-668.

In Michigan, there are two types of joint tenancies. *Albro v Allen*, 434 Mich 271, 274 (1990). In the standard joint tenancy, each tenant has an undivided share and possession of the whole, and upon the death of one tenant, the survivor takes the whole estate. *Id*. at 274-275. However, the right of survivorship may be destroyed if either party conveys his or her interest in the estate, thereby converting the estate into a tenancy in common. *Id*. at 275. On the other hand, the joint tenancy with full rights of survivorship, which is created by express words of survivorship, is a joint life estate with indestructible dual contingent remainders. *Id*. at 275-276. In this type of joint tenancy, the right of survivorship cannot be affected by the conveyance of one tenant's interest, i.e., the tenancy cannot be converted into a tenancy in common. *Id*. at 278.

A tenancy by the entirety has been referred to as a "species" or "modified form" of joint tenancy. *Hoyt*, *supra* at 518. A tenancy by the entirety would be considered a modified form of the standard joint tenancy. A tenancy by the entirety is similar to the standard joint tenancy, but has the added element of a marriage. *Budwit v Herr*, 339 Mich 265, 273 (1954). Neither spouse can alienate or encumber the property without the consent of the other. *Long v Earle*, 277 Mich 505, 517 (1936). If the husband and wife are divorced, they become tenants in common of the property, and the survivorship rights are destroyed. *Budwit*, *supra* at 273.

In her concurring statement, Justice KELLY minimizes the difference between a joint tenancy and a joint tenancy with full rights of survivorship, stating: "[S]tandard joint tenancies and joint tenancies with the full rights of survivorship both entail the right of survivorship. The primary distinction between the two is that the latter may not be converted to a tenancy in common." *Ante* at 861-862. This is a quite significant difference between the two types of estates. The Court of Appeals holding that the accounts were tenancies by the entirety altogether ignored the distinction between a joint tenancy with full rights of survivorship and a standard joint tenancy by converting an estate with indestructible survivorship rights into an estate with destructible survivorship rights. The only way to create a joint tenancy with full rights of survivorship rather than a standard joint tenancy is to include survivorship language, which the parties clearly did in this case. While Justice KELLY correctly asserts that "[t]enants by the entirety enjoy the same right of survivorship as joint tenants," she fails to recognize that tenants by the entirety do not enjoy the same rights of survivorship as joint tenants with full rights of survivorship. *Ante* at 862. The judgment of the Court of Appeals *in this case* essentially eliminated the difference between a standard joint tenancy and a joint tenancy with full rights of survivorship by treating the account as a standard joint tenancy.[3]

The Court of Appeals held that to create a joint tenancy, the parties must use the words "not as tenants by the entirety" as indicated in *DeYoung*. However, the Court in *DeYoung* did not hold that such a formulaic provision was required to rebut the presumption of a tenancy by the entirety. Rather, the Court was speculating concerning what evidence would be sufficient to rebut the presumption. Moreover, the statute itself does not require any particular language to indicate that the tenancy is not by the entirety, but only requires some express provision

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[3] Justice KELLY disagrees, asserting that "[b]oth types of estates can be created by the use of appropriate language." *Ante* at 862 n 28. In the wake of the Court of Appeals ruling in this case, the "appropriate language" a married couple must use to create a joint tenancy with full rights of survivorship apparently is "as joint tenants with the right of survivorship and not as tenants by the entirety." I find it absurd to conclude that the Proberts or Salomon Smith Barney should have contemplated as a function of existing caselaw that such language was required to set up a joint tenancy with full rights of survivorship.

to rebut the presumption. The express provision in this case, "JTWROS," met this requirement. A joint tenancy with rights of survivorship is distinct from both a standard joint tenancy and its modified form, the tenancy by the entirety.[4] In addition, there was evidence that the Proberts had the option of setting up the accounts as tenancies by the entirety, but specifically chose to set up joint tenancies with rights of survivorship. It would be utterly superfluous to require the Proberts to additionally write "and not as a tenancy by the entirety" after the initials "JRS" or "JTWROS" on the forms, or to require Salomon Smith Barney to include such language on its forms, when a tenancy by the entirety is already an option, designated "ENT."[5]

The Court of Appeals distinguished its decision in *VanConett* on the basis that explicit language was used to rebut the presumption and that the property was owned jointly by three people rather than just a husband and wife. This is not a reasonable distinction, in my judgment. First, the explicit language that the Court of Appeals referred to in *VanConett* was the phrase "and not as tenants in common." This language does not rebut the presumption of a tenancy by the entirety under the reasoning of the Court of Appeals in this case that the phrase "not as tenants by the entirety" is required; a tenancy in common is an

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[4] The practical differences between the two estates with regard to personal property, such as brokerage accounts, are minimal compared to the differences between the two estates with regard to real property. In this case, Robert and Liza Probert could deplete the accounts or even close them altogether, leaving the "indestructible contingent remainder" as nothing. However, the difference is relevant in the instant case to demonstrate the intention to create a specific type of account, because neither a standard joint tenancy nor a joint tenancy with rights of survivorship are subject to the protections that MCL 600.6023a affords a tenancy by the entirety.

[5] Justice KELLY dismisses this evidence because the form containing this designation "pertains solely to an account of the Proberts that has no funds." *Ante* at 862. However, that form is relevant to demonstrate Salomon Smith Barney's practice of using the abbreviation "ENT" to designate a tenancy by the entirety on its standard forms. Kemp's testimony also verifies this practice. Further, Justice KELLY asserts that "there is nothing to show that the Proberts specifically chose to hold as joint tenants instead of as tenants by the entirety." *Ante* at 862. She states that the application form for the first account was filled out on the basis of an oral interview Kemp conducted with the Proberts. *Ante* at 862. However, this statement, coupled with Kemp's testimony that the Proberts set up the accounts as joint tenants with rights of survivorship and could have set up the accounts as tenants by the entirety, completely refutes Justice KELLY's conclusion that there is no evidence that the Proberts specifically chose to set up the accounts as joint tenants with rights of survivorship.

entirely different type of estate than a tenancy by the entirety. Second, the fact that the property was jointly owned by three people ignores the express recognition in *VanConett* that a joint tenancy could be created between a married couple holding property as tenants by the entirety and a joint tenant. *VanConett*, *supra* at 667 n 1.

Here, there was an express provision creating a joint tenancy with rights of survivorship, and also evidence that the Proberts specifically chose not to create a tenancy by the entirety. This was sufficient to overcome the presumption that the Proberts held the accounts as tenants by the entirety. I would reverse the Court of Appeals judgment and reinstate the trial court's ruling that the accounts were held as joint tenancies with rights of survivorship and, therefore, not subject to the protection of MCL 600.6023a.

Leave to Appeal Denied July 23, 2008:

PEOPLE v EUGENE KNIGHT, No. 131180. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR 6.500 *et seq*. that may include the issues whether the 15-year maximum sentence represents a violation of the plea agreement, which the circuit court in part characterized as the defendant's agreeing to plead guilty to "the charge of perjury with the understanding that the initial sentence would be limited to a maximum of five years in prison," and whether counsel was ineffective for failing to object on this ground. See Plea Transcript (April 30, 1997), at pp 2-4, 8-9. Court of Appeals No. 269209.

WEST v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 132156; Court of Appeals No. 251003.

PEOPLE v ERWIN HARRIS, No. 135535. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280406.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

HEALING PLACE AT NORTH OAKLAND MEDICAL CENTER v ALLSTATE INSURANCE COMPANY, No. 135670; Court of Appeals No. 272960.

CAVANAGH WEAVER, and KELLY, JJ. We would grant leave to appeal.

In re TROY (REED v LEARY), No. 136164; Court of Appeals No. 279852.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

SEGER v HARTFORD INSURANCE COMPANY OF THE MIDWEST, No. 136183; Court of Appeals No. 274572.

PEOPLE v ALTON, No. 136205; Court of Appeals No. 282524.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v TOBIAS, No. 136225; Court of Appeals No. 283379.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CORDERO JONES, No. 136230; Court of Appeals No. 276822.

PEOPLE v LOWERY, No. 136254; Court of Appeals No. 283424.

PEOPLE v BURBRIDGE, No. 136271; Court of Appeals No. 273133.

PEOPLE v MICHAEL MORGAN, No. 136279; Court of Appeals No. 280871.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v BULLITT, No. 136281; Court of Appeals No. 276426.

KELLY, J. I would remand this case to the trial court for resentencing.

GEROW v SAGINAW, No. 136293; Court of Appeals No. 269112.

Summary Disposition July 23, 2008:

PEOPLE v HIGHLAND, No. 128180. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for further proceedings not inconsistent with this order. The defendant filed a timely motion to withdraw his plea. When that motion was denied, he filed a timely motion for reconsideration. The circuit court did not enter an order disposing of that motion. The August 31, 2004, letter in the court file is not an order properly disposing of the motion, the docket entries do not reflect any disposition of the motion, and the file otherwise contains no such order. As a consequence, the reconsideration motion was outstanding and the defendant's case was pending on direct review when the United States Supreme Court decided *Halbert v Michigan*, 545 US 605 (2005), entitling the defendant to the appointment of counsel. *Griffith v Kentucky*, 479 US 314 (1987). The defendant's application for leave to appeal to the Court of Appeals should have been dismissed as premature rather than as untimely.

In this case, no remand for the appointment of counsel is necessary, however, because after the Court of Appeals dismissed the appeal, and while the defendant's application was pending in this Court, the circuit court appointed attorney James D. Lovewell as counsel pursuant to *Halbert*. Counsel may now file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of this order, as, at the time defendant was denied counsel, he was entitled to file pleadings within 12 months of sentencing rather than six months. See the 2004 versions of MCR 7.205(F)(3), MCR 6.311, and MCR 6.429. Counsel may include among the issues raised, but is not required to include, those issues raised by the defendant in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 259652.

PEOPLE v OLSEN, No. 129223. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the April 13, 2004, order of the Lapeer Circuit Court purporting to amend the defendant's judgment of sentence to add a provision barring contact with his minor children. We remand

this case to the circuit court for reinstatement of the original judgment of sentence, dated November 20, 2001. The circuit court lacked authority to make substantive changes to the November 20, 2001, judgment of sentence after entry, because it is the final judgment in the case. MCR 6.435(B). On remand, the circuit court shall notify the Michigan Department of Corrections that the "no contact" order has been rescinded. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). This order does not prevent the prosecutor or the defendant's children from seeking to obtain a personal protection order that would bar the defendant from having contact with his children. We do not retain jurisdiction. Court of Appeals No. 259314.

SCHINDLER v ASPLUNDH TREE EXPERT COMPANY, No. 136016. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, the issue whether the Michigan Bureau of Workers' Compensation has jurisdiction over the controversy arising out of plaintiff's injury, MCL 418.845. The Court of Appeals shall address the remaining issues only if it determines that jurisdiction in Michigan is proper. Court of Appeals No. 279296.

KELLY, J. I would deny leave to appeal.

PEOPLE v CHRISTIAN-BATES, No. 136162. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and we reinstate the defendant's convictions and sentences. The trial court's admitted error in cutting off defense counsel's closing argument to the jury was harmless where the defendant admitted shooting at the victim, the only question for the jury was the defendant's intent, and the jury convicted the defendant of the lesser offense of assault with intent to do great bodily harm. MCL 769.26. Court of Appeals No. 269919.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WRIGHT v MICRO ELECTRONICS, INC, No. 136324. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and we remand this case to the Oakland Circuit Court for reinstatement of the circuit court's summary disposition order. The Court of Appeals erred by reinstating the plaintiff's defamation and false light invasion of privacy claims where the plaintiff consented to the ongoing posting of the allegedly offending material, *Smith v Calvary Christian Church,* 462 Mich 679 (2000), and where the plaintiff admitted that the material was intended and taken as a "joke" perpetrated by a coworker. The Court of Appeals erred by reinstating the plaintiff's negligence and intentional infliction of emotional distress claims, where these are personal injury claims barred by the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1), and the plaintiff has presented no evidence that the defendant employer intended to injure the plaintiff or had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Travis v Dreis & Krump Mfg Co,* 453 Mich 149 (1996). Court of Appeals No. 274668.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 25, 2008:

MOORE v SECURA INSURANCE, No. 135028. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the benefits at issue were "overdue," MCL 500.3148(1), 500.3142(2); (2) whether defendant "unreasonably refused to pay the claim or unreasonably delayed in making proper payment," MCL 500.3148(1); (3) assuming defendant unreasonably refused to pay, but also assuming that only a portion of the benefits sought and awarded were "overdue," whether MCL 500.3148(1) permits recovery of attorney fees for all benefits sought and recovered; and (4) whether the Court of Appeals erred in suggesting that "it is . . . possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them." Reported below: 276 Mich App 195.

CAVANAGH J., did not participate due to a familial relationship with counsel of record.

GRIEVANCE ADMINISTRATOR v COOPER, No. 135053. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the Attorney Discipline Board erred in holding that the July 29, 2002, fee agreement was ambiguous as to whether the $4,000 minimum fee was nonrefundable; (2) whether the agreement or the respondent's partial retention of the minimum fee after the client terminated the relationship violated MRPC 1.5(a), MRPC 1.15(b), or MRPC 1.16(d); and (3) whether the Attorney Discipline Board erred in finding the respondent guilty of violating the Rules of Professional Conduct and/or in declining to make its ruling prospective only, in light of (a) its acknowledgments that it "provided something less than coherent guidance," and that "it was only recently, and only in a [September 29, 2005] memorandum to the Michigan Supreme Court, that we expressed the view that there really is no such thing as a nonrefundable retainer," (b) the lack of record evidence that such a memorandum was provided to the respondent, and (c) the fact that "a lawyer of ordinary prudence," at the time the agreement was executed on July 29, 2002, must have been "left with a definite and firm conviction that the fee is in excess of a reasonable fee" in order for the Attorney Discipline Board to find a violation of MRPC 1.5(a).

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. ADB: 06-000036-GA.

PEOPLE v CHRISTIAN SIERRA, No. 135772. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address (1) what constitutes a "similar motive" to develop testimony under MRE 804(b)(1); and (2) whether the trial court abused its

discretion when it concluded that, at the 1999 trial of Domingo Sierra, in which this defendant's guilt was not directly at issue, the prosecution lacked a "similar motive" to develop the testimony of the unavailable declarant, Lisa Vega, by direct, cross, or redirect examination within the meaning of MRE 804(b)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 277838.

Summary Dispositions July 25, 2008:

THOMAS v HAWKINS, No. 135830. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. In *Sellars v Lamb*, 303 Mich 604, 610-611 (1942), this Court held that "a situation in which a receiver would be even *tempted* to favor one or another party cannot be tolerated." (Emphasis in original.) Here, plaintiffs produced sufficient evidence in support of their claim that the sale of the Sweet Georgia Brown restaurant was tainted, or at least *appeared* to be tainted, with a conflict of interest through Hollowell's representation of Wendy Hawkins, La-Van Hawkins, and La-Van Hawkins's business entities. Moreover, Hollowell's refusal to include the co-receiver in the bidding and sale process raised legitimate concerns about his impartiality. Further, Hollowell did not procure any other bids for the restaurant or secure appraisals, and Hollowell knew Frank Taylor, the buyer, and gave him a $160,000 credit, thereby preferring Taylor over secured creditors. Therefore, on the facts at the time of filing as reconstructed at the remand hearing, this claim was *not* frivolous, because plaintiffs had a good faith factual basis to raise the conflict of interest issue. We remand this case to the Wayne Circuit Court for further proceedings consistent with this order. Court of Appeals No. 271031.

KELLY, J. I would deny leave to appeal.

PEOPLE v MERCER, No. 135811. In lieu of granting leave to appeal, we remand this case to the Ingham Circuit Court to rule on defendant's motion to quash the bindover. We direct that court to issue its ruling within 28 days of the date of this order. We further order that court to file with the clerk of the Supreme Court a transcript of the hearing and related documents within 28 days of its ruling.

"This Court will not unnecessarily decide constitutional issues, *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001), and it is an undisputed principle of judicial review that questions of constitutionality should not be decided if the case may be disposed of on other grounds. *MacLean v Michigan State Bd of Control for Vocational Ed*, 294 Mich 45, 50; 292 NW 662 (1940)." *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734 (2003). We decline to reach the constitutional

prearrest delay issue before the propriety of the bindover decision is resolved. We retain jurisdiction. Court of Appeals No. 281006.

CAVANAGH, J. (*dissenting*). I dissent from the order remanding to the Ingham Circuit Court to rule on defendant's motion to quash the bindover. While I believe the circuit court might well have dismissed on the basis of defendant's motion to quash the bindover, as all expert medical opinion concerning cause of death that supported the prosecution's theory had been stricken at the preliminary examination, the circuit court did not address this motion. Instead, it granted defendant's motion to dismiss for prearrest delay, a ruling that is now presented for our review. I would address the jurisprudentially significant issue of whether due process may require dismissal of a prosecution where there is actual and substantial prejudice, even if there is no evidence that the prosecutor intentionally delayed bringing charges to gain a tactical advantage. The length of the delay and potential for prejudice in this case is tremendous. By failing to resolve this issue, this Court will potentially subject defendant to an unfair trial. Even if the circuit court grants defendant's motion to quash the bindover on remand, defendant could be subjected to another preliminary examination and potential trial, if the prosecutor refiles this charge. Further, by evading the opportunity to resolve the proper standard applicable to similar prearrest delay cases, this Court potentially subjects many more defendants in this state to stale, unfair prosecutions.

This case concerns the prosecution of defendant Charles Mercer for the murder of his wife, Sally Mercer. Sally Mercer died in 1968; defendant was not charged with open murder until 2006. There was an autopsy and police investigation immediately following Sally Mercer's death in 1968. The autopsy report noted that some of Sally Mercer's blood vessels exhibited a "surrounding collar of lymphocytes" and indicated that the cause of her death was bulbar polio. Toxicological analysis on Sally Mercer's blood and stomach-content samples detected slightly high levels of aspirin, but no other drugs. The toxicological analysis could have detected propoxyphene in the blood if it had been present in sufficient amount, but not in a very small amount.[1]

The Ingham County Prosecutor at the time disagreed with the cause of Sally Mercer's death indicated by the autopsy report. On the basis of direct and circumstantial information available to him, the prosecutor believed Sally Mercer's death was a homicide and considered defendant the suspect. However, no criminal prosecution was pursued at the time; the prosecutor indicated that he did not believe he had sufficient evidence to initiate criminal proceedings. In 1970, the samples of Sally Mercer's blood and stomach contents were returned to the Ingham County Sheriff's Department to be discarded.

The case lay dormant until 1995, when a cold-case team began reinvestigating Sally Mercer's death. Her body was exhumed in 2003, and a second autopsy was performed. Samples of her tissue were tested by a

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[1] Propoxyphene is a component of Darvon Compound-65, a readily available analgesic in the 1960s.

toxicology laboratory. The tests showed that lethal levels of propoxyphene were present in her tissue. The testing of her hair indicated that she had been using propoxyphene regularly.

In June 2006, defendant was charged with open murder. The bill of particulars specifically accused defendant of committing first-degree murder by injecting Sally Mercer with lethal doses of propoxyphene. At the lengthy preliminary examination, several expert witnesses testified for the prosecution regarding the levels of propoxyphene found in Sally Mercer's tissues. The district court admitted the experts' testimony for the most part, but excluded the experts' conclusions that acute propoxyphene intoxication was the cause of Sally Mercer's death pursuant to *Daubert v Merrell Dow Pharmaceuticals*, *Inc,* 509 US 579 (1993). The district court found that there was probable cause to believe that defendant committed the offense of murder, despite having "buckets of reservations," and bound defendant over for trial.

Defendant filed a motion to dismiss because of prearrest delay. The circuit court granted defendant's motion to dismiss, applying the test used for speedy-trial violations. The Court of Appeals peremptorily reversed in an order issued December 18, 2007. The panel indicated that according to *United States v Marion*, 404 US 307 (1971), and *People v Crear*, 242 Mich App 158 (2000), dismissal may not be granted for prearrest delay unless there has been intent to delay by the prosecution to gain a tactical advantage. Defendant appealed, and this Court ordered oral argument on the application. 480 Mich 1148 (2008). Now, a majority of this Court has decided to remand. I respectfully dissent. I would reverse the Court of Appeals and reinstate the circuit court's dismissal.

The Court of Appeals erred in concluding that dismissal may only be granted for prearrest delay if there is evidence that the prosecutor intentionally delayed arrest to gain a tactical advantage. In *Marion*, the United States Supreme Court addressed the claim that pre-indictment delay violated two defendants' Sixth Amendment speedy-trial rights and due-process rights. The Court rejected the speedy-trial claim, concluding that the Sixth Amendment speedy-trial protection does not apply until a person becomes an "accused"—in other words, when a person has been indicted. *Id*. at 313. The Court also rejected the due-process claim as premature, as the defendants asserted only that they faced the possibility of prejudice at trial, not that actual prejudice had occurred. *Id*. at 325-326. Although the Court dismissed the due-process claims because they were premature, it suggested that due process might require dismissal of charges when actual prejudice occurs:

> Since [the defendants] rely only on potential prejudice and the passage of time between the alleged crime and the indictment, . . . we perhaps need go no further to dispose of this case . . . . Nevertheless, since a criminal trial is the likely consequence of our judgment and since [the defendants] may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the [defendants'] rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of

> the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [defendants'] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. . . . However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. [*Id*. at 323-324.]

Marion establishes that a defendant must demonstrate actual prejudice, not merely potential prejudice, to challenge prearrest delay as a violation of due process. However, since the *Marion* defendants only alleged potential prejudice, the Court's discussion of a successful due-process challenge was merely advisory. Thus, the Court's reference to intentional delay caused by the prosecution was dictum. Moreover, the statement that prejudice *and* intentional delay would require dismissal was merely a recitation of the *government's* concession, and did not necessarily annunciate the Court's position. Accordingly, the Court of Appeals erred in relying on *Marion* for the proposition that intentional delay by the prosecution is necessary to a successful due-process challenge on the basis of prearrest delay.

The Court squarely addressed the issue of determining whether a prearrest delay violates due process in *United States v Lovasco*, 431 US 783 (1977), in which a defendant alleged that actual prejudice had resulted from the prosecutor's 18-month delay for further investigation. The Court noted that "proof of actual prejudice makes a due process claim concrete and ripe for adjudication," not automatically valid. *Lovasco*, *supra* at 789. Because proof of prejudice is "a necessary but not sufficient element of a due process claim, . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id*. at 790. The Court articulated the inquiry as "whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.' " *Id*. (citations omitted). The Court concluded that "prosecutors do not deviate from 'fundamental conceptions of justice' when they defer seeking indictments until they have probable cause to believe an accused is guilty . . . ." *Id*. at 790-791. The Court explained at length why no interests would be served by compelling prosecutors to initiate prosecutions as soon as legally possible. In the Court's opinion, "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused,' " because "investigative delay is not so one-sided." *Id*. at 795 (citations omitted). Therefore, "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id*. at 796. Acknowledging that circumstances in which delay would require dismissal cannot be determined abstractly, the Court left to the lower

courts "the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." *Id*. at 797. It concluded that in the case at hand, the indictment should not have been dismissed. *Id*.

The United States Supreme Court has not elaborated on the applicable standard for determining due-process violations in prearrest delay cases since *Lovasco*. There is a split of authority on the matter among federal circuit courts and state courts, including our own Court of Appeals. Some panels contend that there can be no due-process violation unless the delay was intentionally caused by the prosecution to gain a tactical advantage. See *People v White*, 208 Mich App 126 (1994), and *Crear*, *supra*. Other lines of authority do not require evidence of intentional delay, but, rather, consider whether the reasons for the delay justify the resulting prejudice. See *People v Bisard*, 114 Mich App 784 (1982), and *People v Adams*, 232 Mich App 128 (1998).

I believe that constitutional due process does not require a showing that the prosecution's delay was an intentional device to gain a tactical advantage. Rather, the intent of the prosecution is only a factor for the court's analysis. There was no evidence or allegations of intentional delay in *Lovasco*, yet the Court did not dispose of the claim for that reason. Instead, *Lovasco* examined at great length the prosecutor's proffered reasons for the delay—investigative strategy—and determined that the resulting delay did not violate " 'fundamental conceptions of justice which lie at the base of our civil and political institutions' " and which define " 'the community's sense of fair play and decency.' " *Lovasco*, *supra* at 790 (citations omitted). Thus, the guiding principle of *Lovasco*, which should direct our evaluation of this matter, is whether prosecuting a defendant after a delay would violate fundamental conceptions of justice in light of the reasons for delay. A showing of bad faith is not necessary when the defendant has been so prejudiced by the delay that a criminal trial would be fundamentally unfair.

The test that I would adopt seeks a balance between the competing interests of the defendant and the government. Specifically, it would balance the prejudice to the defendant with the reasons for the delay and determine whether defendant can be given a fair trial. Once a defendant has established prejudice, the burden of explaining delay would fall on the prosecution. This approach was illustrated in *Bisard*, *supra*, which held:

> When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however, there is a justifiable reason for the delay, the defendant must show more—that the prejudice resulting from the delay outweighs any reason provided by the state. [*Id*. at 790.]

The defendant bears the initial burden of showing prejudice; once this is shown, the prosecutor has the burden to show that the reason for the delay is sufficient to justify whatever prejudice resulted. *Id*. at 791.

Regardless of whether we adopt the standard articulated by *Bisard* or a different variation of a balancing test, the proper inquiry is best defined by applying *Lovasco*'s principles to particular cases. This case would have been an excellent vehicle because the prejudice is so stark. Most other prearrest delay cases involve a matter of months or perhaps a couple of years, not 40 years. In this case, there is no question that defendant would be prejudiced by facing a trial in which all the original evidence has been destroyed, the remaining scientific testing was done on a decomposed corpse, and many of the original witnesses have died or have faded memories. It suffices to say that an evaluation of the prejudice to the defendant weighs strongly in his favor. Meanwhile, the justification for the delay is weak. There is no evidence of bad faith, but there is also no indication that the delay was a necessary or even reasonable part of an ongoing investigation. In fact, defendant was suspected of and investigated for murder at the time of Sally Mercer's death, but the prosecutor at the time declined to bring charges. No new evidence arose after the original investigation that would have reasonably prompted the reinvestigation of this cold case. All the evidence tested in 1995 was available in 1968, and the toxicology screening administered in 1968 could have detected a significant level of propoxyphene if it had been present.

I am persuaded that, on these facts, the trial court did not abuse its discretion in dismissing this case. The prejudice to this defendant far outweighs the state's interest in resuming pursuit of this prosecution after a lengthy and unjustifiable delay. Accordingly, I would reverse the decision of the Court of Appeals and reinstate the circuit court's order dismissing the case.

KELLY, J. I join the statement of Justice CAVANAGH.

Leave to Appeal Denied July 25, 2008:

ELLIS v FARM BUREAU INSURANCE COMPANY, No. 136069; Court of Appeals No. 275240.

MARKMAN, J. (*dissenting*). Plaintiff's rental property was damaged as a result of arson. No one had been living there for several months because plaintiff was in the process of renovating it. Defendant, plaintiff's insurer, refused to cover the damage because the policy excluded fire damage when the property was "vacant or unoccupied beyond a period of 60 consecutive days." After a bench trial, the trial court concluded that defendant was liable. The Court of Appeals affirmed.

Plaintiff purchased the property on May 22, 2003. Within two to three weeks, the tenant moved out. No one else lived on the property between that time and the time of the fire on November 16, 2003. Thus, nobody was living at the property at the time of the fire, nobody had lived at the property for nearly six months before the fire, and nobody was planning on living there in the foreseeable future after the fire. I would hold that the property was "vacant or unoccupied beyond a period of 60 consecutive days," and would reverse the Court of Appeals.

TAYLOR, C.J. I join the statement of Justice MARKMAN.

In re BERSAMINA (DEPARTMENT OF HUMAN SERVICES v MCCARTHY), No. 136836; Court of Appeals No. 281795.

DRAKE v SCHANTZ-RONTAL, No. 135879; Court of Appeals No. 270225.

CAVANAGH, J. I would grant leave to appeal.

WEAVER, J .(*dissenting*). I dissent from the order and would reverse for the reasons stated by the dissenting judge in the Court of Appeals as stated below:

FITZGERALD, J. (*dissenting*).

I respectfully dissent.

In my opinion, the trial court's order striking all of plaintiff's expert witnesses as a sanction for failing to comply with discovery was an abuse of discretion. Because of the importance of expert testimony in medical malpractice actions, the trial court's order resulted in the dismissal of plaintiff's lawsuit. Although striking witnesses is an appropriate sanction in some cases, it is important to remember that the policy of this state favors the meritorious determination of issues. *Tisbury v Armstrong,* [194] Mich App 19, 21; 486 NW2d 51 (1992). After reviewing the record, I do not consider plaintiff's counsel's conduct so egregious or defendant's prejudice so substantial that imposing what is, in essence, the most serious sanction available, is justified. See *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 [(1990)] (discussing the factors to be considered when determining the appropriate sanction). The interests of justice would have been better served by limiting plaintiff to calling only those witnesses identified in her October 25, 2005, and November 17, 2005, correspondences to defendant. [*Drake v Schantz-Rontal,* unpublished dissenting opinion by FITZGERALD, J., entered November 20, 2007 (Docket No. 270225).]

KELLY, J. I join the statement of Justice WEAVER.

Summary Dispositions July 29, 2008:

JONES v COMERICA, INC, No. 133880. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Workers' Compensation Appellate Commission (WCAC) for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). The WCAC may remand this case to the Board of Magistrates for the taking of additional proofs and for further findings upon the request of a party. We do not retain jurisdiction. Court of Appeals No. 272746.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would grant leave to appeal.

PEOPLE v MCINTOSH, No. 135657. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Genesee Circuit Court's orders of August 31, 2006, and June 15, 2007, and we remand this case to the Genesee Circuit Court for consideration of the merits of the defendant's motion for relief from judgment filed on December 27, 2005. Under the circumstances of this case, the motion filed by the defendant on September 2, 2005, did not constitute a motion for relief from judgment under

MCR subchapter 6.500. Accordingly, the Genesee Circuit Court erred in treating the defendant's December 27, 2005, motion for relief from judgment as a successive motion under MCR 6.502(G). We do not retain jurisdiction. Court of Appeals No. 280312.

PEOPLE v RICHARD ARMSTRONG, No. 136327. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Otsego Circuit Court for a hearing under *People v Ginther*, 390 Mich 436 (1973).

In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 272104.

Leave to Appeal Denied July 29, 2008:

In re MILES (MILES v SOLEUS HEALTHCARE SERVICES OF MICHIGAN, INC), No. 133829; Court of Appeals No. 270033.

PEOPLE v CHAVIES, No. 135710. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278356.

PEOPLE v ELLIS, No. 135714. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280255.

PEOPLE v DEANDRE CARTER, No. 135717. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280883.

PEOPLE v JOEL WILLIAMS, No. 135726. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281309.

PEOPLE v ETCHISON, No. 135727. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 280559.

PEOPLE v LUTZKE, No. 135735. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279283.

PEOPLE v SAMUELS, No. 135739. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277170.

PEOPLE v SIMON SIERRA, No. 135746. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279899.

PEOPLE v MOENING, No. 135764. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278768.

PEOPLE v JERRY SMITH, No. 135765. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 277525.

PEOPLE v CORBIERE, No. 135779. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281271.

PEOPLE v UNCAPHER, No. 135786. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281084.

PEOPLE v GARY SMITH, No. 135795. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282139.

PEOPLE v VINCENT COATES, No. 135798. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279287.

PEOPLE v BALDWIN, No. 135802. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279173.

PEOPLE v DEMETRIUS HARDRICK, No. 135813. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280729.

PEOPLE v GUZMAN, No. 135821. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279289.

PEOPLE v CARL HALL, No. 135846. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280442.

PEOPLE v ST JOHN, No. 135854. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279744.

PEOPLE v ANDRE JACKSON, No. 135856. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280959.

PEOPLE v FREDDY HARDRICK, Nos. 135866 and 136578. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 282228 and 282358.

PEOPLE v REDDELL, No. 135869. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282057.

PEOPLE v RANDY GRAY, No. 135870. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282290.

PEOPLE v NERO, No. 135882. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281080.

PEOPLE v COOLEY, No. 135895. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278846.

PEOPLE v KELLY, No. 135899. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278997.

PEOPLE v LARHON JONES, No. 135902. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279207.

PEOPLE v JAMES MOORE, No. 135907; Court of Appeals No. 273912.

PEOPLE v TROFATTER, No. 135908. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281631.

PEOPLE v MCDONALD, No. 135913. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279413.

PEOPLE v RICHARD MORGAN, No. 135927. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281201.

PEOPLE v AUSSICKER, No. 135934. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278788.

PEOPLE v EDWARDS, No. 135937. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281982.

PEOPLE v BANNASCH, No. 135950. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279098.

PEOPLE v FORD, No. 135951. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279279.

PEOPLE v RENODDA HICKS, No. 135952. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280852.

PEOPLE v MARISWAMY, No. 135956. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279298.

PEOPLE v JEFFREY CARTER, No. 135959. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281571.

PEOPLE v HUNTER, No. 135966; Court of Appeals No. 280422.

PEOPLE v PEREZ, No. 135999; reported below: 277 Mich App 676.

PEOPLE v MAURICE COLEMAN, No. 136022; Court of Appeals No. 273057.

PEOPLE v JAMES HICKS, JR, No. 136071; Court of Appeals No. 282508.

PEOPLE v ARTHUR RODGERS, No. 136074; Court of Appeals No. 277412.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v TONI HAYNES, No. 136076; Court of Appeals No. 280725.

PEOPLE v PITTMAN, No. 136106. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279979.

In re ESTATE OF KOSTIN (WILLIAMS v KENT) and *In re* ESTATE OF KOSTIN (WILLIAMS v KOSTIN TRUST), Nos. 136111 and 136112; reported below: 278 Mich App 47.

PEOPLE v JEWELL, No. 136117. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282620.

PEOPLE v RADEMACHER, No. 136118. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279599.

PEOPLE v VINCENT JONES, No. 136119. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282616.

PEOPLE v NATHANIEL SMITH, No. 136122; Court of Appeals No. 283435.

PEOPLE v LOR, No. 136133. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282335.

PEOPLE v OSDEMOND BELL, No. 136140; Court of Appeals No. 283198.

PEOPLE v MICHAEL ALLEN WILLIAMS, No. 136143; Court of Appeals No. 282899.

PEOPLE v SALEM, No. 136158; Court of Appeals No. 279704.

PIESER v SARA LEE BAKERY, Nos. 136159 and 136160; Court of Appeals No. 275608.

PEOPLE v JOSEPH MILLER, No. 136168; Court of Appeals No. 282553.

PEOPLE v FERGUSON, No. 136176; Court of Appeals No. 274614.

PEOPLE v BOWERS, No. 136197; Court of Appeals No. 282903.

PEOPLE v MC FADDEN, No. 136200; Court of Appeals No. 283768.

PEOPLE v POUNCY, No. 136202; Court of Appeals No. 269298.

MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION v PUBLIC SERVICE COMMISSION, No. 136207; Court of Appeals No. 267194.

PEOPLE v BRADBURY, No. 136208; Court of Appeals No. 282867.

PEOPLE v HOPKINS, No. 136210; Court of Appeals No. 283077.

PEOPLE v TROOST, No. 136216; Court of Appeals No. 282987.

PEOPLE v VICTORIA LOVE, No. 136232; Court of Appeals No. 283530.

PEOPLE v CARR, No. 136233; Court of Appeals No. 273778.

PEOPLE v RALPH LEWIS, No. 136241; Court of Appeals No. 274005.

CONTINENTAL TEVES, INC v WESCAST INDUSTRIES CORDELE, LLC and WESCAST INDUSTRIES CORDELE, LLC v CONTINENTIAL TEVES INC, Nos. 136243 and 136244; Court of Appeals Nos. 282073 and 282074.

PEOPLE v BROGLIN, No. 136245; Court of Appeals No. 274342.

PEOPLE v DENISON, No. 136246; Court of Appeals No. 270415.

PEOPLE v HUMPHREYS, No. 136249; Court of Appeals No. 283836.

PEOPLE v JAMES WHITE, JR, No. 136255; Court of Appeals No. 274304.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan,* 480 Mich 1165 (2008).

PEOPLE v DEVAUGHN BROWN, No. 136258; Court of Appeals No. 283301.

PEOPLE v BELISLE, No. 136265; Court of Appeals No. 280948.

PEOPLE v LEMONS, No. 136268; Court of Appeals No. 273058.

In re LESLIE E TASSELL TRUSTS (COTTER v TASSELL ESTATE), No. 136272; Court of Appeals No. 279543.

GRIEVANCE ADMINISTRATOR v SWANSON, No. 136273; ADB No. 0411-AI-000147.

KORN FAMILY LIMITED PARTNERSHIP v HARBOR BUILDING COMPANY, LLC, Nos. 136274 and 136276; Court of Appeals No. 272813.

PEOPLE v MANOKU, No. 136280; Court of Appeals No. 270880.

PEOPLE v COREY PATTERSON, No. 136287; Court of Appeals No. 283660.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v JACINTO PENA, No. 136289; Court of Appeals No. 275508.

PEOPLE v JAMAHL ARMSTRONG, No. 136291; Court of Appeals No. 283914.

PEOPLE v BENNIE BRYANT, No. 136295; Court of Appeals No. 270900.

BAUTISTA v MIRESCO PROMOTIONAL SALES, INC, No. 136296; Court of Appeals No. 280858.

PEOPLE v DAMEKO VESEY, No. 136303; Court of Appeals No. 266618.

PEOPLE v SALLEE, No. 136308; Court of Appeals No. 283831.

PEOPLE v CLIFTON, No. 136309; Court of Appeals No. 283264.

PEOPLE v LEE MANUEL, No. 136312; Court of Appeals No. 275209.

PEOPLE v GARNER, No. 136315; Court of Appeals No. 277019.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v BEDINGER, No. 136317; Court of Appeals No. 283920.

PEOPLE v NGUYEN, No. 136318; Court of Appeals No. 274031.

RUBY & ASSOCIATES, PC v GEORGE W SMITH & COMPANY, PC, No. 136319; Court of Appeals No. 274348.

PEOPLE v DERRICK THOMPSON, No. 136330; Court of Appeals No. 272628.

PEOPLE v JERRON DAVIS, No. 136333; Court of Appeals No. 275478.

PEOPLE v KEVIN YOUNG, No. 136334; Court of Appeals No. 275881.

PEOPLE v STENNIS, No. 136344; Court of Appeals No. 283646.

PEOPLE v DENNIS VESEY, No. 136345; Court of Appeals No. 266617.

PEOPLE v OLDECK, No. 136346; Court of Appeals No. 283760.

PEOPLE v TERENCE ROBINSON, No. 136347; Court of Appeals No. 283755.

PEOPLE v BERGER, No. 136348; reported below 277 Mich App 700.

PEOPLE v LARSON, Nos. 136354 and 136355; Court of Appeals Nos. 283581 and 283802.

RODRIGUEZ v MERCHANT, No. 136356. The plaintiffs may file a delayed application for leave to appeal in the Court of Appeals on or before October 24, 2008. See MCR 7.205(F)(3). Court of Appeals No. 282671.

PEOPLE v STEVEN BROWN, No. 136361; Court of Appeals No. 283615.

PEOPLE v JAMES WALKER, No. 136362; Court of Appeals No. 283832.

PEOPLE v DONALD PALMER, No. 136363; Court of Appeals No. 282334.

PEOPLE v ORVIS, No. 136364; Court of Appeals No. 275839.

PEOPLE v SACHS, No. 136365; Court of Appeals No. 275560.

PEOPLE v BEAN, No. 136366; Court of Appeals No. 271585.

KOROI v UNITED SERVICES AUTOMOBILE ASSOCIATION, No. 136368; Court of Appeals No. 281054.

PEOPLE v SOURS, No. 136371; Court of Appeals No. 275406.

PEOPLE v CARPENTER, No. 136372; Court of Appeals No. 275837.

PEOPLE v MAJEWSKI, No. 136381; Court of Appeals No. 283622.

PEOPLE v DEXTER HARRIS, No. 136387; Court of Appeals No. 276767.

PEOPLE v ERIC GARLAND, No. 136389; Court of Appeals No. 283585.

PEOPLE v WILLAVIZE, No. 136390; Court of Appeals No. 283431.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v ROBERT FISHER, No. 136391; Court of Appeals No. 274580.

PEOPLE v FENSTERMAKER, No. 136392; Court of Appeals No. 284003.

PEOPLE v ZOICA, No. 136395; Court of Appeals No. 270881.

PEOPLE v HASBERRY, No. 136396; Court of Appeals No. 275685.

PEOPLE v SHAW, No. 136397; Court of Appeals No. 283617.

PEOPLE v SHERRY, No. 136398; Court of Appeals No. 281892.

PEOPLE v LAZZERICK LONG, No. 136400; Court of Appeals No. 282731.

PEOPLE v YARBROUGH, No. 136402; Court of Appeals No. 283257.

HARRIS v DAVIS, No. 136416; Court of Appeals No. 276880.

PEOPLE v HAWKINS, No. 136421; Court of Appeals No. 275841.

HARVEY v CURTIS, No. 136424; Court of Appeals No. 272433.

GRAY v DETROIT MUNICIPAL PARKING DEPARTMENT, No. 136432; Court of Appeals No. 274356.

PEOPLE v BENSON JACKSON, No. 136435; Court of Appeals No. 276351.

PEOPLE v SAILLOR, No. 136439; Court of Appeals No. 282052.

PEOPLE v MERKO, No. 136440; Court of Appeals No. 271800.

MUNSTER v CITY OF BATTLE CREEK, No. 136441; Court of Appeals No. 284666.

PEOPLE v DESMOND MATTHEWS, No. 136445; Court of Appeals No. 283680.

PEOPLE v BUSSLER, No. 136446; Court of Appeals No. 283834.

PEOPLE v GREGORY WALKER, No. 136448; Court of Appeals No. 275656.

PEOPLE v SHAWNTAE ROGERS, No. 136450; Court of Appeals No. 278576.

PEOPLE v SINGLETON, No. 136452; Court of Appeals No. 283307.

PEOPLE v KING, No. 136462; Court of Appeals No. 275194.

PEOPLE v CLEVELAND ROGERS, No. 136463; Court of Appeals No. 274615.

PEOPLE v DEXTER, No. 136473; Court of Appeals No. 284152.

PEOPLE v KENNETH ANDERSON, No. 136474; Court of Appeals No. 275080.

PEOPLE v UNDERWOOD, No. 136484; reported below: 278 Mich App 334.

PEOPLE v EDWARDS, No. 136491. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280609.

PERRY v BON SECOURS COTTAGE HEALTH SERVICES, No. 136501; Court of Appeals No. 281557.

SHANKSTER v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 136503; Court of Appeals No. 284850.

RUSSELL PLASTERING COMPANY v MICHIGAN CONSTRUCTION INDUSTRY MUTUAL INSURANCE COMPANY, No. 136508; Court of Appeals No. 274049.

PEOPLE v GJELDUM, No. 136510; Court of Appeals No. 283874.

PEOPLE v JOBEY HENDERSON, No. 136527; Court of Appeals No. 279861.

GOULET v ANN ARBOR PUBLIC SCHOOLS, No. 136534; Court of Appeals No. 281685.

PEOPLE v HARRINGTON, No. 136583. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281560.

Reconsiderations Denied July 29, 2008:

DOWNS v KEEBLER, No. 132893. Summary disposition entered at 480 Mich 1081. Court of Appeals No. 253611.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

KORPAL v SHAHEEN, No. 133717. Leave to appeal denied at 480 Mich 1193. Court of Appeals No. 266418.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant the motion for reconsideration.

PEOPLE v YOSHEYAH THOMAS, No. 134148. Leave to appeal denied at 480 Mich 1185. Court of Appeals No. 272334.

PEOPLE v BEEMAN, No. 134338. Leave to appeal denied at 481 Mich 851. Court of Appeals No. 275107.

KELLY, J. I would grant the motion for reconsideration.

PEOPLE v CARSWELL, No. 134578. Leave to appeal denied at 480 Mich 1185. Court of Appeals No. 268081.

DOBBELAERE v AUTO-OWNERS INSURANCE COMPANY, Nos. 134600 and 134601. Leave to appeal denied at 480 Mich 1169. Court of Appeals Nos. 270200 and 270275.

GOODMAN v DAHRINGER, No. 134696. Summary disposition entered at 481 Mich 882. Court of Appeals No. 273680.

PEOPLE v HERNANDEZ-ORTA, No. 134756. Summary disposition entered at 480 Mich 1101. Court of Appeals No. 267971.

WEAVER, J. I would grant the motion for reconsideration.

PEOPLE v MACLEAN, No. 135245. Leave to appeal denied at 480 Mich 1141. Court of Appeals No. 270525.

KELLY, J. I would grant the motion for reconsideration.

PEOPLE v BASAT, No. 135323. Leave to appeal denied at 480 Mich 1186. Court of Appeals No. 277082.

PEOPLE v HINDS, No. 135372. Leave to appeal denied at 480 Mich 1186. Court of Appeals No. 278367.

BECK v TGM BROADBAND CABLE SERVICES, No. 135521. Leave to appeal denied at 480 Mich 1187. Court of Appeals No. 277384.

TYSON FOODS, INC v DEPARTMENT OF TREASURY, No. 135557. Leave to appeal denied at 480 Mich 1137. Court of Appeals No. 272929.

GROSS v LANDIN, No. 135674. Leave to appeal denied at 480 Mich 1188. Court of Appeals No. 275077.

PEOPLE v SEARCY, Nos. 135697 and 135698. Leave to appeal denied at 480 Mich 1189. Court of Appeals Nos. 282489 and 282491.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

DELL v ST CLAIR CIRCUIT COURT, No. 135745. Leave to appeal denied at 481 Mich 877. Court of Appeals No. 281475.

PEOPLE v BULEY, No. 135757. Leave to appeal denied at 480 Mich 1189. Court of Appeals No. 271801.

GAUTHIER v D & T EMERALD CREEK, INC, No. 135782. Leave to appeal denied at 481 Mich 877. Court of Appeals No. 278654.

PEOPLE v TEMPLETON, No. 135785. Leave to appeal denied at 480 Mich 1190. Court of Appeals No. 271082.

PEOPLE v RIGEL, No. 135804. Leave to appeal denied at 480 Mich 1190. Court of Appeals No. 273235.

PEOPLE v SWANIGAN, No. 135806. Leave to appeal denied at 481 Mich 877. Court of Appeals No. 273671.

PEOPLE v SEAN WILSON, No. 135814. Leave to appeal denied at 480 Mich 1190. Court of Appeals No. 279559.

PEOPLE v ANTHONY JAMES, No. 135822. Leave to appeal denied at 480 Mich 1190. Court of Appeals No. 270194.

PEOPLE v EDWARD THOMAS, No. 135968. Leave to appeal denied at 480 Mich 879. Court of Appeals No. 274469.

Leave to Appeal Granted July 30, 2008:

In re ROOD (DEPARTMENT OF HUMAN SERVICES v ROOD), No. 136849. The parties shall include among the issues to be briefed: (1) whether the Department of Human Services made adequate efforts to contact the respondent-appellee father, who had given contact information to the court at the June 8, 2006, hearing concerning the rights of the child's natural mother; (2) whether the Department of Human Services was under a legal duty, imposed by statute or court rule, to conduct a home study or to make other efforts to place the minor child with the respondent father, given the unique circumstances of this case; (3) whether the existence of any legal duty was mitigated by the respondent father's failure to contact the agency for over one year, failure to pursue visitation with his child who had been placed in foster care, or his domestic-violence convictions involving the child's mother; and (4) whether the failure of the family court to send notices of the proceedings to the correct address, or the failure of the Department of Human Services to make diligent efforts to contact the respondent father at the address and telephone number provided by him at the June 8, 2006, adjudication hearing for the respondent mother, precluded the court from terminating respondent father's parental rights.

We further order the Mason Circuit Court, Family Division, utilizing a procedure analogous to that described in Administrative Order No. 2003-3, to determine no later than August 12, 2008, whether the respondent-appellee is indigent and, if so, to appoint attorney Jeffrey C. Nellis, if feasible, to represent the respondent in this Court. If the respondent is not indigent, he must retain his own counsel.

The clerk of the Court is directed to place this case on the October 2008 session calendar for argument and submission. Petitioner-appellant's brief and appendix must be filed no later than August 25, 2008, and respondent-appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than September 15, 2008.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than September 24, 2008. Court of Appeals No. 280597.

Summary Disposition July 30, 2008:

PEOPLE v DEXTER COOPER, No. 136859. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the June 27, 2008, order of the

Court of Appeals and reinstate the stay imposed by the Court of Appeals on August 27, 2007. Court of Appeals No. 280024.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. I would deny leave to appeal because I do not believe that the stay should be reinstated.

Leave to Appeal Denied July 31, 2008:

In re MILTENBERGER (EIFLER v SWARTZ), No. 133847; reported below: 275 Mich App 47.

KELLY, J. (*concurring*). I concur in Justice CORRIGAN's statement with one exception. I find her discussion of the feasibility of gender-neutral dower interesting but irrelevant to intermediate-scrutiny analysis. The current dower statutes pass intermediate scrutiny on their own merits, not because a gender-neutral alternative might be impossible.

Justice CORRIGAN's questions about the feasibility of a future alternative to gender-based dower stem from the following proposition in *Orr v Orr*: "Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."[1] *Orr* invalidated the Alabama alimony statute that required husbands, but not wives, to pay alimony.[2] The Court concluded that the statute already provided for individualized hearings to determine need; therefore, there was no reason "to use sex as a proxy for need."[3] *Orr* dealt with a statute that provided for a gender-neutral determination of need. The Court had no reason to consider whether a gender-based statute might pass constitutional muster if a future gender-neutral scheme were not feasible. Therefore, *Orr* does not require us to address in this case the feasibility of a hypothetical gender-neutral dower statute.

Justice CORRIGAN acknowledges that the feasibility of gender-neutral dower is best left initially to the Legislature. Moreover, the issue is not now before the Court. The parties neither briefed nor argued the feasibility of a gender-neutral dower statute in Michigan. On the contrary, they proceeded on the assumption that gender-neutral dower was a possible alternative to the existing dower statutes. They disagreed only about whether this Court should read the current statutes in gender-neutral terms.

Justice CORRIGAN asserts that gender-neutral dower is likely impossible. She reasons that the Legislature cannot affect the vested rights in real property to which a widower's dower right would attach if it passed a gender-neutral dower statute. However, this problem would occur only if this hypothetical statute applied retroactively. There is no reason to speculate about a problem that may not occur.

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[1] *Orr v Orr*, 440 US 268, 283 (1979).

[2] *Id*. at 271.

[3] *Id*. at 281.

I agree with Justice CORRIGAN that the current dower statutes survive intermediate scrutiny. I express no opinion about the feasibility of a hypothetical gender-neutral dower statute, as that issue is not before the Court.

CORRIGAN, J. (*concurring*). I concur, but write separately to respond to the dissent. I conclude that the gender distinction in Michigan's dower scheme is adequately justified by the well-documented relative economic positions of widows and widowers in this state. Therefore, the Court of Appeals correctly concluded that dower survives equal protection review and declined to deprive the Legislature of this historical tool to aid widows, who, as a group, continue to occupy less favorable economic positions than their male counterparts.

I. FACTS AND PROCEEDINGS

The dissent adequately recounts the straightforward facts of this case and the proceedings in the lower courts. I note only that the Attorney General has not participated in this case on behalf of the state of Michigan. It would have been useful to the Court to have had this issue briefed by the Attorney General.[1] I regret that the trial court did not exercise its discretion under MCR 2.209(D), which permits the court to "require that notice be given to the Attorney General" when "the validity of a Michigan statute . . . is in question in an action to which the state or an officer or agency of the state is not a party . . . ."

II. STANDARD OF REVIEW

The dissent and I agree that intermediate scrutiny applies to equal protection review of laws that discriminate on the basis of gender. "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v Boren*, 429 US 190, 197 (1976). But, as I discuss further in part III(C) of this statement, this standard is a source of controversy, and the United States Supreme Court has provided insufficient guidance concerning its implementation.

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[1] The dissent criticizes me for "eas[ing] the burden on the proponent of the classification by supplying data and arguments in support of the classification beyond that which the proponent presented." *Post* at 945. But I find it necessary to do so in response to the dissent's contention that we should declare a law unconstitutional on the basis of a defense offered by a single private attorney and without the benefit of briefing from the Attorney General on behalf of the state. Moreover, as I discuss further below, United States Supreme Court precedent illustrates that it is appropriate to rely on relevant data when considering the constitutionality of gender-based classifications.

I conclude that, under the intermediate scrutiny standard, dower withstands review because it is substantially related to important objectives: remedying economic discrimination against women and protecting needy spouses. The dissent's point is well-taken, however, that gender is an imperfect proxy for need among surviving spouses. Therefore, dower also appears to reflect gender stereotypes. But finding dower unconstitutional for this reason essentially amounts to review under the strict scrutiny standard reserved for laws discriminating on the basis of race or national origin. I acknowledge the dissent's comparison of my analysis to rational basis review, because I find it necessary to consider real-world data to determine how well-suited dower is to its goals. But because real-world differences between men and women are the foundation of the intermediate scrutiny standard, intermediate scrutiny is unworkable if it requires us to presume that a gender-based distinction is unconstitutional, yet then eschew available statistics comparing the economic and social circumstances of men and women to rebut the presumption, as the dissent urges. Thus, until the United States Supreme Court provides further guidance on implementing intermediate scrutiny, I would not hold unconstitutional our Legislature's choice to retain the ancient right of dower even though it unavoidably reflects gender stereotypes.

III. ANALYSIS

A. IMPORTANT GOVERNMENTAL OBJECTIVES

The dissent and I agree that dower is aimed at important governmental objectives, because it provides support for needy surviving spouses and a remedy for past economic discrimination and lower earnings of women, which contribute to the higher vulnerability of women to poverty or low income after the death of a spouse. See *post* at 933 (stating that dower protects needy spouses and serves "the related purpose of compensating women for past discrimination and lower earnings during marriage, which often left them more vulnerable than men following the death of a spouse"). "[A]ssisting needy spouses is a legitimate and important governmental objective." *Orr v Orr*, 440 US 268, 280 (1979). "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women" has also been recognized as "an important governmental objective." *Califano v Webster*, 430 US 313, 317 (1977); see also *United States v Virginia,* 518 US 515, 533 (1996) (*VMI*), citing *Webster*.[2] I concur generally in the dissent's analysis of the constitutionally sound objectives of Michigan's

[2] In her brief, petitioner Sharon Miltenberger expands on the proposition that women earn less than their husbands during the course of their marriages. She observes that discrimination in the workplace and the traditional roles of married women have resulted in wives making significant noneconomic contributions to their husbands' estates. This may be particularly true of past generations of women who nonetheless

dower statutes. My only qualm with the dissent's analysis lies in its assertion that the "statutes at issue here are little more than recitations of the common law; thus, whether dower under these statutes serves a different or broader purpose than dower served at common law is somewhat questionable." *Post* at 932.

Without question, dower is a longstanding historical right that preexisted even the formation of our nation and that has become embedded in Michigan statutory and common law. The right of dower is " 'so ancient, that its origin is now lost in doubt and uncertainty.' " *Pfau v Moseley*, 9 Ohio St 2d 13, 20 (1966), quoting *Dunseth v Bank of the United States*, 6 Ohio 77 (1833). As one scholar noted:

> From very early times, English law assured to a wife certain rights in her husband's property if she survived him. For centuries those rights have been known as dower. Although the word itself is of French origin, the provision in English law long antedates the coming of the Normans, and its precise beginnings are lost in the dim antiquities of the Germanic law which prevailed in England before the Conquest. The origins of dower take us back to a period in Teutonic history when the bridegroom made a payment to the kinsmen of the bride, in return for the rights over her which he acquired by the marriage, and gave to her a morning [sic] gift for her support if she outlived him. [Haskins, *The development of common law dower*, 62 Harv L R 42, 42 (1948).]

We do know that by at least 1225 the right of dower provided a widow with the right to a 1/3 share of her husband's property. The Magna Carta of 1225 stated: "[L]et there be assigned to [the widow] for her dower a third part of all the land of her husband which was his in his life, unless she was endowed of less at the church door."[3] Michigan recognized the common law right of dower in *May v Rumney*, 1 Mich 1 (1847). In closing the opinion of the Court, Justice Wing stated: "I can see no reason why courts should not now, as formerly, look upon the claim of dower with great favor, and maintain the truth of what Lord Coke says was commonly said, that three things be favored in the law—*life, liberty and dower*." *Id.* at 13 (emphasis in original). Because dower is so deeply

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face widowhood in the twenty-first century. Petitioner asserts that dower "protects the contribution the wife makes to her husband's estate."

[3] Magna Carta of 1225, as quoted in Comment, *The ins and outs of the Alabama elective share*, 58 Ala L R 1161, 1162 (2007). The Magna Carta of 1297 similarly stated that "[a]s dower [the widow] will be assigned the third part of all the lands of her husband which were his during his lifetime, save when she was dowered with less at the church door." National Archives and Records and Records Administration, Featured Documents <http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html> (accessed July 29, 2008).

engrained in historical Michigan and English law, we should not underestimate the significance of questioning its continued viability.

But, contrary to the dissent's suggestion, the historical nature of dower does not necessarily render its goals or means outdated. Recent history suggests that Michigan's policy-makers have concluded that women continue to rely on the historic right of dower, which is a useful means to various related ends that have evolved over time as women's rights and roles have changed. As the dissent recognizes, Michigan's citizens explicitly considered and retained dower both at the state's most recent constitutional convention in 1961 and when the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, was enacted in 1998. Although dower has operated in largely the same manner over time, we should not assume that the objectives it is intended to serve are unchanging.

The delegates to the 1961 Michigan constitutional convention debated at length the modern status of dower and whether it should be abolished.[4] Like the dissent today, *post* at 938-939, some delegates suggested that dower should be abolished because its protections are minimal in modern times. Bay County delegate Milton Higgs suggested that

> dower in itself is not a valuable thing to the wife, in view of her other rights. She can elect to take against the will, she has rights that are superior to this, and as Mr. [Robert] Tubbs has said, it's merely a right to the income to 1/3 of the property for life. This is a cumbersome thing to handle in property law. [2 Official Record, Constitutional Convention 1961, p 2445.]

Other delegates stated that they would not abolish dower precisely because it provides worthwhile minimum protection for women. Washtenaw County delegate Joseph Lawrence, Jr., observed that, for spouses who occupy traditional roles, dower "mean[s] that a husband who normally takes care of things cannot get rid of all his property without his wife having to sign off." *Id*. Perhaps most tellingly, Wayne County delegate Ann Donnelly argued that "[i]nchoate dower rights are of vital interest to the women" even before their husbands' deaths and protect "a married woman in the event of a divorce action." *Id*. She explained:

> I, regrettably, have been involved in representing women in this situation and I know very well it is most vital that we have this signature and this dower clause to protect them in the event that they are having difficulties with their husbands.

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[4] I offer evidence of policy-makers' debates about dower solely to gain insight into their genuine reasons for the gender-based classification in order to avoid justifications that are merely "hypothesized or invented *post hoc* in response to litigation." *VMI*, 518 US at 533 (1996); see also *post* at 932-933.

> [The husband] may alienate this property—not only the homestead, but any other land. He may have $1 million in stocks; but he may have it in apartments, he may have it in land, and the woman who maybe has helped him to acquire this will have no control and no strings whatsoever if they are having difficulty. Now, if there is no marital difficulty, the husband can readily get his wife's signature. If there is marital difficulty and the husband wishes to get rid of the wife and get rid of his property from her name and her control, it can be accomplished if you will adopt [the amendment abolishing dower.] [*Id*.][5]

In light of this discussion, the delegates ultimately decided that the Legislature was in the best position to gauge the need for dower, and the wisdom of retaining it, over time. *Id*. at 3151. Accordingly, although our 1963 constitution abolishes the disabilities associated with coverture, it does not abolish dower, but explicitly provides that "[d]ower may be relinquished or conveyed as provided by law." Const 1963, art 10, § 1.[6]

The Legislature affirmatively decided to retain dower in 1998 when it enacted EPIC in 1998 PA 386. EPIC was modeled on the Uniform Probate Code, which expressly abolished dower. See Uniform Probate Code, § 2-112, 8 ULA pt 1, p 90. The original Senate bill that proposed EPIC likewise abolished dower. 1997 SB 209, §§ 2112, 8102. But, in September 1998, the House of Representatives voted to retain dower and allow a widow to elect it, and the Senate adopted the House amendment. 1998 Journal of the House 2211; 1998 Journal of the Senate 1822-1823, 1830. The historical record provides scant information concerning legislators' reasons for retaining dower, but clearly they considered the ongoing merits of dower, and a majority of legislators concluded that it still served important objectives. Further, the Legislature continues to reevaluate the benefits of our dower scheme over time; HB 5587, introduced in 2007, would abolish dower and is just one of several bills introduced since 1999 that would amend the dower statutes.

In sum, it is beyond question that the historical right of dower continues to serve important objectives of the state of Michigan. Moreover, our Legislature is in the best position to evaluate the ongoing

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[5] Donnelly's comments, made in 1962, apply uncannily to the case before us, in which James Miltenberger transferred all his real property —his office and the marital home—shortly before his death and without obtaining Sharon Miltenberger's signature; he did so only after the couple began having marriage difficulties and planning to divorce. The property certainly would have been marital property subject to division during the divorce proceedings.

[6] Note that the delegates' Address to the People accompanying the new constitution does not comment on the retention of dower or the changes to art 10, § 1. 2 Official Record, Constitutional Convention 1961, pp 3355-3362.

relevance of dower, which may be especially suitable in Michigan. As I discuss further below, economic disparity between the sexes remains pronounced in Michigan: among the 50 states, the District of Columbia, and Puerto Rico, Michigan is one of only eight states with a female-to-male earnings ratio of less than 72 percent, as compared to the national average of 77.3 percent.[7]

B. SUBSTANTIAL RELATION TO ACHIEVEMENT OF OBJECTIVES

The documented evidence of economic disparity between men and women—and especially older men and women, who are more likely to suffer the loss of their spouses—bears directly on whether dower is substantially related to our Legislature's goals. Significantly, however, dower by its nature is not aimed broadly at remedying all economic disparity between the sexes. The dower scheme inherently excludes all unmarried men and women; as an element of the laws governing inheritance, dower relates only to surviving spouses' rights to each other's property. Accordingly, dower aims to protect needy spouses and provide a remedy for economic discrimination against women in one distinct arena: spousal property rights upon the death of a spouse. Thus, dower reflects disparities between widows and widowers by discriminating on the basis of gender only within a limited class of men and women: surviving spouses.[8] It is this population of surviving spouses that we must consider when asking whether dower is sufficiently suited to its goals to survive equal protection review.

I conclude that, although dower is both overinclusive and underinclusive in relation to the target classes of needy surviving spouses and

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[7] In 2006, the median national yearly income for full-time male workers was $42,210. The median income for full-time female workers was $32,649. Thus, nationally, the ratio of women's earnings compared to those of men was 77.3 percent. In Michigan, the median income for males was $47,329 and the median income for females was $33,748. Thus, the comparable earnings ratio of women compared to men in Michigan was 71.3 percent. Only five states have lower earnings ratios—Alabama, Louisiana, North Dakota, West Virginia, and Wyoming. Only two other states' ratios are less than 72 percent—Montana (71.5 percent) and Utah (71.4 percent). United States Census Bureau, *Income, Earnings, and Poverty Data From the 2006 American Community Survey* (2007), pp 13-14, available at <http://www.census.gov/prod/2007pubs/acs-08.pdf> (accessed July 21, 2008).

[8] The dissent similarly observes that, for dower to be upheld, Sharon Miltenberger must demonstrate a "gender-based difference within the narrow population" reached by the relevant statutes: surviving spouses. The gender-based distinction "must be justified by showing that gender is a valid proxy for need within this population." *Post* at 940.

widows who have suffered economic discrimination, it reflects genuine differences between men and women who have lost a spouse, including that (1) widows receive considerably less income than widowers, (2) women over the age of 65 are more likely to live in poverty than similarly aged men, (3) women have longer life expectancies and, therefore, need economic support for a longer period after the loss of a spouse's contributions to the family, (4) women have less overall earning power in Michigan, and (5) women—particularly those of past generations who may face widowhood in current times—may have relied on their inchoate dower rights during the course of their marriages. Because there are significant documented differences in the economic circumstances of widows and widowers, the use of gender as a proxy for economic disadvantage among surviving spouses is substantially related to the goals of dower.

As the dissent observes, United States Census Bureau statistics show that, generally, the median income of married men is nearly double that of married women.[9] As previously noted, Michigan generally falls well behind the national average—and the averages of 44 states, the District of Columbia, and Puerto Rico—in wage-equality between the sexes.[10] The dissent also acknowledges that women over 65 are 71 percent more likely than similarly aged men to live in poverty.[11] The United States Social Security Administration confirms that women receive significantly

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[9] *Post* at 939, citing a table in United States Census Bureau, Income, Marital Status—All Races 18 Years Old and Over by Median Income and Sex: 1974 to 2006, available at <http://www.census.gov/hhes/www/income/histinc/p13ar.html> (accessed June 16, 2008). Although surviving spouses are the relevant class receiving disparate treatment on the basis of gender, information concerning the economic status of all women is still relevant to the discussion. Potential widows are a subclass of both all women and married women. They are also commonly over 65. Further, a woman's income from work affects her pension and social security benefits upon retirement. Thus, economic comparisons of women to men, married women to married men, and men and women over 65 are relevant to describe the differences between potential widows and widowers as subclasses of these groups.

[10] See n 7 of this statement.

[11] *Post* at 934, citing Legal Momentum, Reading Between the Lines: Women's Poverty in the United States 2004 (2004), p 1. Government data compiled from the last comprehensive census (2000) confirm that 11.9 percent of women over 65, and only 7 percent of men over 65, lived in poverty. Women over 65 were also twice as likely as men over 65 to live alone. United States Census Bureau: *We the People, Women and Men in the United States* (2005), pp 7, 14, available at <http://www.census.gov/prod/2005pubs/censr-20.pdf> (accessed July 21, 2008).

less income than men upon retirement.[12] One reason that women are more likely to face poverty over the age of 65 is longer life expectancy.[13] In 2004, the average life expectancy for American women was 80.4 years, compared to 75.2 years for men.[14] Accordingly, among the aging population most likely to become surviving spouses, gender correlates with economic need.

Further, women's longer life expectancies may underlie gender-based distinctions without offending equal protection. Indeed, gender-based distinctions are subject to heightened equal protection review—and *not* to the strict scrutiny review applicable to distinctions on the basis of race—in part because men and women *on the whole* have physical differences. Thus, although our "inherent differences" may not be employed "for denigration of the members of either sex or for artificial constraints on an individual's opportunity," sex is not "a proscribed classification." *VMI,* 518 US at 533 (1996). As the United States Supreme Court observed:

> The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national

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[12] Women's Social Security benefits are lower than those of men and women's median income upon retirement from private pensions or annuities is less than one half of men's median income from such sources. Social Security Online, Press Office, Social Security is Important to Women, available at <http://www.socialsecurity.gov/pressoffice/factsheets/women.htm> (accessed July 10, 2008); Social Security Online, Office of Policy Data, Income of the Population 55 or Older, 2004, available at <http://www.socialsecurity.gov/policy/docs/statcomps/income_pop55/> (accessed July 10, 2008).

The dissent also observes, however, "that men experience a greater proportional loss of income than women after losing a spouse[.]" *Post* at 936 n 9. I would note that, although a man may lose a higher *percentage* of his income upon the loss of a spouse, this is in part because his income was higher *to begin with*; he still earns significantly more in raw dollars after the death of a spouse than does a woman. Using the statistics for 2005 cited by the dissent, *post* at 937 n 9, the average widower earns roughly double the very meager poverty threshold for Americans over 65 (which was $9,367 in 2005), whereas the average widow earns only about 1½ times the threshold amount. United States Census Bureau, Poverty, Poverty Thresholds 2005, available at <http://www.census.gov/hhes/www/poverty/threshld/thresh05.html> (accessed July 10, 2008).

[13] *Social Security is Important to Women*, n 12, *supra*.

[14] Arias, United States Life Tables, 2004, 56 National Vital Statistics Reports, No. 9, p 4 (2007), available at <http>://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf> (accessed July 10, 2008).

> origin classifications. See *Loving* v. *Virginia,* 388 U.S. 1 (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard* v. *United States,* 329 U.S. 187, 193 (1946). [*Id.*][15]

For these reasons, the distinction between widows and widowers does not rest on mere "archaic and stereotypic notions" or mere presumptions that women "suffer from an inherent handicap or [are] innately inferior . . . ." *Mississippi Univ for Women v Hogan*, 458 US 718, 725 (1982). Rather, the direct evidence of economic disparity between these populations shows that the classification is rooted in accurate data and a "reasoned analysis," not "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women," *id.* at 725-726, or " 'overbroad generalizations about the different talents, capacities, or preferences of males and females,' " *Nevada Dep't of Human Resources v Hibbs,* 538 US 721, 729 (2003) (citation omitted). To use the words of the dissent, here a "palpable connection" clearly exists "between gender and the trait for which it serves as a proxy[.]" *Post* at 935.

1. *CALIFANO v WEBSTER*

United States Supreme Court precedent confirms that gender classifications are warranted in marital law and in the retirement context when the classifications remedy women's lower earnings in the past. Indeed, dower directly resembles the portion of the Social Security Act found to be constitutional in *Webster*, although the law discriminated between men and women. The law in *Webster* permitted women to exclude three more lower-earning years from the computation of their average wages—resulting in relatively higher benefits upon retirement—because women "have been unfairly hindered from earning as much as men . . . ." *Webster,* 430 US at 315-318. The resulting gender classification was constitutional because it "works directly to remedy some part of the effect of past discrimination." *Id.* at 318. Dower has a similar effect, because it assists in addressing women's lower incomes upon retirement, which are one result of lower earnings during women's working lives. Most significantly, like Michigan's dower scheme, the statute in *Webster* is both underinclusive of less wealthy male workers, who could not benefit from the additional three-year exclusion although they earned lower wages than other

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[15] In the words of *Jenness v Fortson*, 403 US 431, 442 (1971): "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . . "

men, and overinclusive of more wealthy female workers who could make use of the exclusion although they may not have directly suffered from discrimination.

2. *KAHN v SHEVIN*

Next, in *Kahn v Shevin*, 416 US 351(1974), the United States Supreme Court expressly recognized the disparate financial effect on women who lose their spouses. Citing labor statistics similar to those cited above concerning economic and wage disparity between the sexes, the *Kahn* Court concluded that a Florida tax law granting a $500 property tax exemption to widows but not widowers permissibly "cushion[ed] the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Id.* at 353-355. Thus, *Kahn* is directly relevant to the case before us and supports the conclusion that gender-based dower does not offend equal protection. Further, in her brief, Sharon Miltenberger makes the following compelling observation:

> A woman of 65 now, one most likely to be in the class taking benefit of dower, was 34 when the statistics relied upon in the *Kahn* decision were recorded. The majority of today's widows were in their prime earning capacity years when women, even college educated women, earned far less than nearly any man. This deprived them not only of earnings at that time, but also the ability to accumulate wealth and property for the future.

Finally, like the statute in *Webster* and Michigan's dower scheme, the law upheld in *Kahn* is underinclusive of needy spouses because it does not address the needs of less wealthy widowers and overinclusive of widows because it does not exclude high-earning women.

The dissent essentially dismisses *Kahn,* opining that the Court employed rational basis review instead of heightened scrutiny. *Post* at 942-943. I do not think that *Kahn* may be so easily overlooked. *Kahn* was indeed decided before the United States Supreme Court established the modern test for intermediate scrutiny, which requires a gender classification to be "substantially related" to "important governmental objectives . . . ." *Craig,* 429 US at 197. Rational basis review merely requires a classification to be "rationally related to a legitimate governmental purpose." *Clark v Jeter*, 486 US 456, 461 (1988). *Kahn* upheld the law at issue by concluding that "Florida's differing treatment of widows and widowers " ' "rest[s] upon some ground of difference having a fair and *substantial relation* to the object of the legislation." ' " *Kahn,* 416 US at 355, quoting *Reed v Reed,* 404 US 71, 76 (1971) (emphasis added; citation omitted). Thus, the *Kahn* Court's conclusion appears to have been grounded in something more than a rational connection between the classification and a legitimate governmental purpose. Rather, the *Kahn* Court concluded that the classification bore a substantial relation to the goal of cushioning the effect of economic discrimination and disparity in

income after the loss of a spouse, which the dissent agrees is an important governmental objective. And, as the dissent concedes, *Kahn* has not been overruled, *post* at 942, but is still good law. Accordingly, I conclude that *Kahn* remains persuasive here.[16]

The dissent also distinguishes *Kahn* because it "relied heavily on the fact that the provision at issue was a tax provision . . . ." *Post* at 943. The *Kahn* Court observed: "States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation" when " 'taxation is concerned and no specific federal right, apart from equal protection, is imperiled . . . .' " *Kahn,* 416 US at 355 (citation omitted); *post* at 943. Because *Kahn* stated that leeway is afforded when taxation is concerned and no federal right *apart from equal protection* is involved, I cannot conclude that the Court's decision that the law comported with the Equal Protection Clause arose merely or primarily from special deference to Florida's taxing power.

3. *CRAIG v BOREN*

The dissent prefers to compare dower to the law found unconstitutional in *Craig*. But, for several significant reasons, I conclude that *Craig* does not require us to hold that Michigan's dower scheme violates the Equal Protection Clause. Indeed, as I discuss further in part III(C), the dissent's application of *Craig* would effectively render all gender classifications unconstitutional.

First, *Craig* is a problematic decision because although a majority of justices concurred in the result, only a plurality concurred in Justice Brennan's lead opinion. Justices Powell and Stevens each concurred, but explicitly condemned Justice Brennan's endorsement of a middle-tier analysis. *Craig,* 429 US at 210 (Powell, J., concurring); *id*. at 212 (Stevens, J., concurring). Justice Stewart similarly concurred in the result because he concluded the classification "amount[ed] to total irrationality . . . without even a colorably valid justification or explanation," and therefore the law constituted "invidious discrimination." *Id.* at 215 (Stewart, J., concurring in result). Chief Justice Burger and Justice Rehnquist dissented, rejecting the propriety of a middle-tier analysis, *id.* at 217 (Burger, C.J., dissenting); *id*. at 217-218 (Rehnquist, J., dissenting), and harshly criticizing Justice Brennan's attempts to justify his result by subjecting the state to "the judicial equivalent of a doctoral examination in statistics," *id.* at 221-226 (Rehnquist, J., dissenting).

Second, the goals and means of the statute at issue in *Craig* bore no resemblance to those of Michigan's dower scheme. The Oklahoma law permitting sales of 3.2 percent alcoholic beverages to women aged 18 years or older and men aged 21 years or older was ostensibly aimed at

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[16] Moreover, as I explain below, the line between rational basis review and intermediate scrutiny review is not easily drawn, but is a source of much controversy.

traffic safety.[17] *Craig,* 429 US at 199. Thus, the law was in no way aimed at remedying past discrimination between the sexes. Indeed, the *Craig* Court distinguished *Kahn* and *Schlesinger v Ballard,* 419 US 498 (1975), for that very reason. *Craig* noted that *Kahn* and *Schlesinger* "uph[eld] the use of gender-based classifications . . . [based] upon the Court's perception of the laudatory purposes of those laws as remedying disadvantageous conditions suffered by women in economic and military life." *Craig,* 429 US at 198 n 6. The Court then concluded: "Needless to say, in this case Oklahoma does not suggest that the age-sex differential was enacted to ensure the availability of 3.2% beer for women as compensation for previous deprivations." *Id.*[18] The law at issue in *Craig* also did not recognize a historic property right of women. Rather, for reasons unclear to the Court, the law precluded sales of certain alcohol to men under 21, when it could easily have precluded sales to all persons under 21.

Third, the statistics in *Craig* revealed a significantly less direct relationship between drunk driving and men aged 18 to 20 than the statistics here correlating widows and economic disadvantage as compared to widowers. The dissent relies on dicta and generalized statements in *Craig* regarding the "dubious[ness]" of "proving broad sociological propositions by statistics," and the less tenuous correlations in other cases that were nonetheless rejected as insufficient. *Post* at 936, quoting *Craig,* 429 US at 204. Indeed, I *agree* that the use of statistics "inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Post* at 936, quoting *Craig*, 429 US at 204. But, as *Craig* illustrates, unless we are to apply strict scrutiny or strike down all gender-based classifications, empirical data may be necessary to gauge whether there is a substantial relationship between such a classification and an important governmental objective. See part III(C) of this statement.

The actual statistics underlying the Court's holding in *Craig* are not comparable to the data relevant here. The *Craig* plurality did *not* find the statistics insufficient merely because 2 percent of men as compared to 0.18 percent of women were arrested for drunk driving. Rather, it concluded that these data represented the "most focused and relevant" of the statistics offered by the state, yet they did not justify the classification because, overall, the "statistics exhibit[ed] a variety of other shortcomings that seriously impugn[ed] their value to equal protection analysis."

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[17] The Court strongly questioned whether traffic safety was the true goal of the statute, but accepted the state's claims for purposes of discussion. *Craig,* 429 US at 199-200 and n 7.

[18] In dissent, Justice Rehnquist similarly observed: "Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination . . . . " *Craig,* 429 US at 219 (Rehnquist, J., dissenting). "There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts." *Id.*

Craig, 429 US at 201-202. Most significantly, the statistical surveys did not "justify the salient features of Oklahoma's gender-based traffic-safety law" because "[n]one purport[ed] to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally"; the Court found this detail to be "of particular importance since, in light of its low alcohol level, Oklahoma apparently consider[ed] the 3.2% beverage to be 'non-intoxicating.' " *Id.* at 202-203. The plurality added: "Moreover, many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, ma[de] no effort to relate their findings to age-sex differentials as involved here." *Id.* at 203. Indeed, Justice Brennan noted that roadside surveys had established that " 'the under-20 age group generally showed a lower involvement with alcohol in terms of having drunk within the past two hours or having a significant BAC (blood alcohol content).' " *Id.* at 203 n 16 (citation omitted). Thus, the surveys "provide[d] little support for a gender line among teenagers and actually r[an] counter to the imposition of drinking restrictions based upon age." *Id.*

In contrast, as explained above, although gender-based dower is somewhat over- and underinclusive of its goals, there is a clear correlation between widows and economic need, as well as past economic discrimination. The correlation rests on more than the mere "loose-fitting generalities concerning the drinking tendencies of aggregate groups" presented in *Craig*. *Craig,* 429 US at 209. Further, the law at issue in *Craig* discriminated against men to serve the general goal of traffic safety, which is unrelated to gender in substance. But here, dower's gender classification is expressly aimed at remedying gender disparities.

4. *ORR v ORR*

Perhaps most significantly, Michigan's dower scheme is distinguishable from the laws compared by the dissent because those laws are amenable to gender-neutral application. The dissent compares cases in which the United States Supreme Court "has held that using gender as a proxy for need is unwarranted when nondiscriminatory means of determining need are equally available." *Post* at 937. It relies on *Orr v Orr*, 440 US 268 (1979). But *Orr* is distinguishable for significant reasons that exemplify the differences between the case before us and the cases on which the dissent relies. The statute in *Orr,* which allowed for women but not men to receive alimony upon divorce, similarly sought to assist needy spouses and compensate for past discrimination. *Id.* at 280. But, crucially, the statute in *Orr* provided for individualized hearings at which both spouses' financial circumstances were examined. *Id.* at 281. Accordingly, the gender-based distinction was gratuitous; the hearings would allow similarly situated individuals to be treated the same with little if any additional burden on the state, and the effort to aid disadvantaged women "would not in any way be compromised." *Id.* at 281-282. Thus, the state's "compensatory and ameliorative purposes [were] as well served by a gender-neutral classification as one that gender classifies . . . ." *Id.* at 283.

In contrast, probate proceedings under Michigan's EPIC provide no such mechanism to determine financial need. I respectfully suggest that the dissent is too cavalier in suggesting that "nondiscriminatory methods" such as gender-neutral dower or "[d]ower provisions that apply to those spouses who demonstrate an actual need for dower" would serve the goals of dower "equally well, if not better." *Post* at 938. While I concur that the Legislature would do well to establish a nondiscriminatory solution, as other states have done, the Legislature alone can determine the feasibility of such a solution in Michigan. At this time, individualized hearings such as those suggested by the dissent do *not* exist. As I will explain below, I also question the feasibility of creating a gender-neutral dower scheme that is consistent with existing property rights in Michigan. Accordingly, I do not think that *Orr* is controlling.

5. *WENGLER v DRUGGISTS MUT INS CO, CALIFANO v GOLFARB,* AND *WEINBERGER v WIESENFELD*

Other cases on which the dissent relies involved laws with similarly available means for gender-neutral application. In *Wengler v Druggists Mut Ins Co,* 446 US 142, 151 (1980), widowers but not widows were required to prove dependence on a spouse's earnings before receiving workers' compensation death benefits. The Court concluded that administrative convenience did not justify discrimination when benefits could be made available either to all applicants regardless of sex or to both men and women who proved dependence. *Id*. at 151-152. *Califano v Goldfarb*, 430 US 199 (1977), addressed federal old-age, survivors, and disability insurance benefits automatically payable to widows, but payable to widowers only upon proof of dependency. Significantly, not only was a method for proving dependency already in place, but the Court centrally held that the law violated equal protection because it was *not* aimed at compensating for need or discrimination, but "reflect[ed] only a presumption that [women] are ordinarily dependent" and denigrated women's wage earnings. *Id*. at 214. Finally, the dissent cites *Weinberger v Wiesenfeld*, 420 US 636 (1975), for the proposition that distinctions "not entirely without empirical support" nonetheless may not meet equal protection standards. *Post* at 935, quoting *Weinberger,* 420 US at 645. *Weinberger* is relevant to the extent that dower may offend equal protection by denigrating women's work and earnings, *id*. at 645, as I discuss below. But, as in *Wengler*, the Court did not hold the Social Security Act benefits scheme at issue in *Weinberger* unconstitutional because it employed gender as an imperfect proxy for need. To the contrary, the Court concluded that benefits available automatically only to widows *with children* were not designed to remedy economic discrimination; rather, the classifications were "intended to permit women to elect not to work and to devote themselves to the care of children." *Id*. at 648. The Court concluded: "Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work." *Id.*

6. *THE "SUBSTANTIAL RELATION" TEST APPLIED TO THIS CASE*

The dissent stresses that dower is underinclusive even with regard to economically disadvantaged widows and overinclusive with regard to widows who do not face financial difficulty. These points are well-taken. But dower is not *unconstitutional* merely because it is imperfect. First, although dower may apply only in limited circumstances, those circumstances are meaningful. As the dissent notes, " '[s]ince a surviving spouse generally takes a dower or curtesy interest free from debts, these interests may offer more protection than other spousal protection provisions.' " *Post* at 931, quoting 15 Powell, Real Property, § 85.20[2][c], p 379. Significantly, dower also normally attaches to the marital home.[19] Further, dower is not available on a purely random basis. Rather, it is a viable option *only if* a husband transfers real property *without his wife's consent*, see MCL 558.13, and *also* leaves a minimal estate; in other words, it is available in cases such as this one, in which Sharon Miltenberger's husband transferred the marital home and his office without her consent shortly before his death and left an estate with a net worth of only $8,823.06. Finally, dower is only available *from* transferees who received the property with notice that it was subject to a wife's dower rights; presumably, if the property is purchased, the wife's contingent rights are reflected in a lower purchase price. Thus, although dower may become available in rare circumstances to a widow who is not economically advantaged, the grantee is not unjustly caught unaware of her potential claim.

Dower is also underinclusive in the sense that it does not benefit the statistically smaller group of needy widowers. But dower does not denigrate women's earnings, as did the laws at issue in *Wengler, Goldfarb,* and *Weinberger.* The dissent asserts that "[p]recluding men from asserting a dower right in their wife's lands provides female landowners fewer protections than male landowners." *Post* at 942. But what prevents a woman from selling her land for a lower price in order to provide her husband a contingent 1/3 remainder during the course of his life? Indeed, because any landowner has such an option, dower appears *primarily* applicable to cases like this one, in which a spouse explicitly sought to shield his wealth from his mate, who may have relied on her dower right. In contrast, *Goldfarb, Wengler,* and *Weinberger* involved disparate treatment of women in *public* schemes that directly devalued their earnings and for which they had no private remedy.[20] The gender-based distinction in the federal program addressed by *Goldfarb*, which paid benefits to

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[19] The particular importance of a woman's use of her marital home after her husband's death was explicitly raised at the 1961 constitutional convention. Indeed, the delegates considered eliminating dower "except as to the homestead." 2 Official Record, Constitutional Convention 1961, pp 2444-2445.

[20] *Craig* is similarly distinguishable. There the classification resulted in a detriment to males aged 18 to 20 who had no option to buy 3.2 percent alcohol upon proof that they never drove while under the influence of

widows automatically but to widowers only upon proof of dependency, "result[ed] in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men . . . ." *Goldfarb,* 430 US at 206-207. The workers' compensation scheme in *Wengler* similarly allowed automatic benefits for widows, but not for widowers, without regard to a deceased wife's past work and earnings. *Wengler,* 446 US at 151. In *Weinberger,* the Court explicitly observed that although "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support," the social security taxes at issue

> were deducted from [the wife's] salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received [because only widows with children automatically received death benefits], but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. [*Weinberger,* 420 US at 645.]

In sum, dower is not a perfect proxy for need or a complete remedy for past discrimination even within the relevant population of surviving spouses. But dower is not as imperfect—or as easily replaced—as the dissent suggests. Although we may not *like* the current state of affairs in which women—and widows in particular—are economically disadvantaged as a result of discrimination or of arguably outdated gender-based family roles, the data show that dower is *not* based on mere " 'assumptions as to dependency' " inconsistent with "contemporary reality." *Goldfarb,* 430 US at 207 (citations omitted); *post* at 934. Dower also imposes no particular harm on women landowners who are not economically disadvantaged, because they may contractually protect their husbands. Similarly, landowning men may remove the burden of dower from their transactions simply by soliciting their wives' signatures. Retaining dower also protects the choices of women who have historically relied on its existence while taking time off from work to raise children or maintain their homes.

Most significantly, dower serves important, constitutionally sound governmental objectives that are *not* equally served by hypothetical gender-neutral schemes without additional burdens on the state. Unlike the gender-neutral schemes available in *Orr* and *Goldfarb,* gender-based dower cannot be eliminated without compromising the effort to aid disadvantaged women. See *Orr,* 440 US at 282. The gender distinction here is not "gratuitous." See *Weinberger,* 420 US at 653. I would wholeheartedly support laws that provide "more direct means of reallocating income or other personal wealth" than "providing a life estate in a portion of lands owned by a woman's husband[.]" *Post* at 941. But this

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alcohol. Yet a husband may solicit his wife's signature to ensure that her dower rights are extinguished when he wishes to transfer land.

Court cannot direct the Legislature to create complex social support regimes out of thin air. Indeed, I am not convinced that the Legislature could feasibly adopt a gender-neutral dower scheme, as the dissent suggests. *Post* at 938. First, no mechanism exists to determine whether a spouse is sufficiently dependent to justify a dower right in property owned by a third party. Most significantly, gender-neutral dower for husbands in land already transferred would compromise vested property rights; although a woman's right to dower has always been embedded in Michigan law pertaining to real property, a man's right to dower has never been recognized or taken into account during past transactions involving real property.

For these reasons, I conclude that the dissent wrongly equates the shortcomings of dower with its unconstitutionality. There is undeniable evidence that widows are economically disadvantaged as compared to widowers, *particularly in Michigan*. Because dower does not denigrate women, and because no system of social welfare or remedy for past discrimination can achieve complete success, I conclude that the gender distinction inherent in Michigan's dower statutes is sufficiently related to the goals of dower to withstand equal protection scrutiny.

C. THE CONTOURS OF INTERMEDIATE SCRUTINY

The dissent accuses me of engaging in rational basis review. *Post* at 944. I, in turn, conclude that the dissent's formulation of intermediate scrutiny amounts to strict scrutiny and would invalidate most, if not all, conceivable gender-based classifications. Overall, absent further guidance from the United States Supreme Court concerning implementation of the intermediate scrutiny standard, I would not invalidate our Legislature's recent choice to retain dower as a remedy for past economic discrimination and aid some number of impoverished widows while preventing them from becoming public charges. Although dower appears to reflect stereotypes, it is also rooted in documented differences in circumstances between the sexes.

"The heightened review standard . . . does not make sex a proscribed classification." *VMI,* 518 US at 533. The law may recognize our differences as long as it does not do so to "denigrat[e] . . . the members of either sex" or to create "artificial constraints on an individual's opportunity." *Id.* Moreover, remedying past discrimination against women is explicitly recognized as an important governmental objective. *Id.*; *Webster,* 430 US at 317. Thus, evidence of real-world disparities between men and women or discrimination on which a challenged statute is premised is both relevant and necessary to intermediate scrutiny.

Yet, as my debate with the dissent illustrates, courts are at a loss about how to employ such evidence in practice. As noted, the *Craig* Court itself engaged in a debate about the appropriateness and workability of intermediate scrutiny. Tellingly, in his dissent, Justice Rehnquist remarked that use of the substantial relation test "requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them." *Craig,* 429 US at 221. Courts commonly use statistics when applying the intermediate

scrutiny standard.[21] But the divisive question remains: How much and what kind of empirical support is sufficient to justify the classification?

The United States Court of Appeals for the Third Circuit attempted to answer this question in *Contractors Ass'n of Eastern Pennsylvania, Inc v Philadelphia,* 6 F3d 990 (CA 3, 1993), a so-called "affirmative action" case involving a city contracting program that gave preferential treatment to enterprises owned by racial and ethnic minorities, women, and handicapped persons. With regard to the preference in favor of women, the court observed:

> Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context . . . . In particular, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. The Supreme Court gender-preference cases are inconclusive. The Court has never squarely ruled on the necessity of statistical evidence of gender discrimination. And its decisions are difficult to reconcile on the point. The Court has upheld gender preferences where no statistics were offered, *Schlesinger* . . . , 419 U.S. 498, 508-09 . . . (preferential employment treatment for women military officers), struck down gender preferences despite the presence of statistics, *Craig* . . . , 429 U.S. 190, 203-04 . . . (statute allowing 18 year old women but only 21 year old men to purchase 3.2% beer), *Weinberger* . . . , 420 U.S. 636 . . . (statute allowing survivors' benefits for widows but not widowers), and also decided cases both ways by relying in part on statistics, *Hogan,* 458 U.S. at 728 . . . (striking down female-only nursing school), . . . *Webster,* 430 U.S. 313, 318 & n. 5 . . . (upholding federal statute allowing women to eliminate more low-earning years from calculation of their retirement benefits than men). [*Id.* at 1010.]

The Third Circuit ultimately concluded that the city was required "to present probative evidence in support of its stated rationale for the gender preference," relying on the Supreme Court's statement "that an affirmative action program survives intermediate scrutiny if the propo-

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[21] See, e.g., *Hogan,* 458 US at 729 n 14 (citing, among other things, national statistics published by the United States Census Bureau regarding the percentage of nursing degrees conferred on women as compared to men); *Craig,* 429 US at 201-203, and the discussion in III(B)(3) of this statement; and *Kahn,* 416 US at 353-354 and n 7 (citing, among other things, national statistics published by the United States Census Bureau and the Women's Bureau of the United States Department of Labor regarding income disparity between the sexes).

nent can show it was 'a product of analysis rather than a stereotyped reaction based on habit.' " *Id.,* citing *Metro Broadcasting, Inc v FCC,* 497 US 547, 582-583 (1990).[22]

The Eleventh Circuit helpfully refined the Third Circuit's test in *Engineering Contractors Ass'n of South Florida, Inc v Metropolitan Dade Co,* 122 F3d 895 (CA 11, 1997). There, addressing a similar law aimed at remedying discrimination against women, the court opined:

> Although it is clear that both gender-conscious and race- or ethnicity-conscious programs must be tested for evidentiary sufficiency, the measure of the evidence required is less clear in the gender context. The Supreme Court has not addressed the question explicitly, and there is a similar dearth of guidance in the reported decisions of other federal appellate courts. . . . The Supreme Court has told us plainly that race- and ethnicity-conscious programs must be tested for a "strong basis in evidence," and a body of appellate jurisprudence has developed to provide that label with meaningful content. *See, e.g.,* [*City of Richmond v JA Croson Co*, 488 US 469, 499-504 (1989)] (identifying factors that cannot form a "strong basis in evidence"); [*Ensley Branch, NAACP v Seibels,* 31 F3d 1548, 1565 (CA 11, 1994)] (citing and applying *Croson*). In the gender context, however, we must work without an analogous evidentiary label from the Supreme Court, and the jurisprudence is less developed.
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> Regardless of what label might be affixed to the standard, it is clear to us that a gender-conscious affirmative action program can rest safely on something less than the "strong basis in evidence" required to bear the weight of a race- or ethnicity-conscious program. We agree with the Third Circuit that "[l]ogically, a [local government] must be able to rely on less evidence in enacting a

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[22] The Third Circuit held that the city had not met this burden because it provided no "probative statistical evidence" and its anecdotal evidence consisted only of one three-page affidavit alleging discrimination and one "conclusory sentence" from a witness who attended a city council meeting. *Contractors Ass'n,* 6 F3d at 1011. With regard to the city's statistics, the court observed: "[T]he City relies on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but this evidence only reflects the participation of women in City contracting generally, rather than in the construction industry, which is the only cognizable issue here." *Id.* at 1010-1011. The court also noted that a study provided by the city "contain[ed] no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses." *Id.* at 1011. Accordingly, the city's evidence was "insufficient to create an issue of fact." *Id.*

> gender preference than a racial preference because applying *Croson*'s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny." *Contractors Ass'n,* 6 F.3d at 1010; *see also* Peter Lurie, Comment, *The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from Croson,* 59 U. Chi. L. Rev. 1563, 1584-89 (1992) (concluding that "[t]he factual predicate required cannot be equal to that needed to support a racial classification" because "[a]ppending a *Croson*-style factual predicate to the standard disingenuously transforms" intermediate scrutiny into strict scrutiny).
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> While there is a difference between the evidentiary foundation necessary to support a race- or ethnicity-conscious affirmative action program and the evidentiary foundation necessary to support a gender preference, that difference is one of degree, not of kind. In both circumstances, the test of the program is the adequacy of evidence of discrimination, but in the gender context less evidence is required. The difficulty, of course, is in determining how much less. [*Id.* at 909.]

The Eleventh Circuit proceeded to examine the "probative evidence" standard enunciated by the Third Circuit in *Contractors Ass'n.* The Court approved of the standard as applied, explaining:

> Plainly, the evidence offered by the government in *Contractors Association* was "probative" as that word is commonly understood, because it tended, at least to some extent, to prove discrimination against women. . . . The probative evidence in *Contractors Association* was nonetheless judged "insufficient." We think that the court's *holding* in *Contractor's Association* is more helpful than the "probative evidence" standard the opinion articulates. Under the Third Circuit's *holding,* evidence offered in support of a gender preference must not only be "probative," it must also be "sufficient." [*Id.* at 909-910.]

In attempting to circumscribe this "sufficient probative evidence" standard, the court analogized and contrasted the stricter "strong basis in evidence" standard applicable to race-based classifications. It focused on "two principal guidelines that mark the boundaries of intermediate scrutiny evidentiary analysis." *Id.* at 910.

> First, "[u]nder the intermediate scrutiny test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself." *Ensley Branch,* 31 F.3d at 1580. Indeed, "[o]ne of the distinguishing features of intermediate scrutiny is that, unlike strict scrutiny, the government interest prong of the inquiry can be satisfied by a

> showing of societal discrimination in the relevant economic sector." *Id.* (citations omitted). Thus, to be sufficient the evidence need not be about governmental discrimination.
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> Second, the intermediate scrutiny evidentiary review is not to be directed toward mandating that gender-conscious affirmative action is used only as a "last resort," *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 217 (4th Cir. 1993) (racial discrimination case), but instead to ensuring that the affirmative action program is "a product of analysis rather than a stereotyped reaction based on habit," *Contractors Ass'n,* 6 F.3d at 1010 (quoting *Metro Broadcasting,* [497 US at 582-583]). Nevertheless, any " 'analysis' that rests upon unsupported factual premises cannot possibly be 'reasoned,' and an untrue and widely-held generalization about men or women is by definition a 'stereotype.' " *Lamprecht v. FCC,* 958 F.2d 382, 393 n. 3 (D.C.Cir.1992) (Thomas, Circuit Justice). That is why the intermediate scrutiny evidentiary "inquiry turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed." *Ensley Branch,* 31 F.3d at 1581. Unsupported generalizations will not suffice. [*Id.*]

The Eleventh Circuit concluded: "Under those guidelines, the government must satisfy an 'intermediate' standard—less stringent than the 'strong basis in evidence' standard associated with strict scrutiny, yet more demanding than merely any probative evidence." *Id.*[23]

As applied here, Sharon Miltenberger presented data showing both wage disparities between the sexes and the relative poverty of men and women over 65. She addressed both the national and local economic spheres, as well as wage disparities among the married population capable of becoming surviving spouses. With regard to the closeness of "fit" between dower's means and its capability of remedying these disparities, I conclude that she also showed that dower is "a product of analysis rather than a stereotyped reaction based on habit." *Metro Broadcasting,* 497 US at 582-583. As the Eleventh Circuit acknowledged, the meaning of "sufficient," even in reference to this standard, "may elude precise formulation . . . ." *Engineering Contractors Ass'n,* 122 F3d at 910. But *Hogan* provided crucial guidance on this point by explaining the *purpose* of the substantial relation test: "'The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan,* 458 US

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[23] Compare the Tenth Circuit's similar observations in *Concrete Works of Colorado, Inc v City & Co of Denver,* 321 F3d 950, 959-960 (CA 10, 2003).

at 725-726.[24] Thus—in keeping with the *Craig* Court's concerns about the "dubious[ness]" of "proving broad sociological proposition by statistics," *Craig,* 429 US at 204 (Brennan, J.), and the unworkability of a test that "requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them," *id.* at 221 (Rehnquist, J., dissenting)—*Hogan* suggests that the sufficiency or "fit" of the data is judged not by whether a law's proponent can meet some numerical threshold, but by whether the data reflect permissible goals rooted in true differences. If, as here, the data reflect true differences and the law provides some degree of remedy for the resulting disparities, the law's proponent has shown that the law is constitutional because it is not based on mere reflexive assumptions that denigrate the sexes. Put otherwise, the law is constitutional because it does not rely on "unsupported factual premises," and, since strict scrutiny does not apply, the law need not be justified as a "last resort" or have a "*strong* basis in evidence." See *Engineering Contractors Ass'n,* 122 F3d at 910 (emphasis added). These conclusions are practically required if we are to distinguish strict scrutiny from intermediate scrutiny while honoring the current, somewhat conflicting body of equal protection jurisprudence.

Finally, the dissent relies heavily on the United States Supreme Court's reluctance to uphold gender classifications in the realm of marital law. *Post* at 929-930, 945. I offer two responses. First, as previously discussed, the cases cited by the dissent are generally distinguishable, because they involve public schemes that directly denigrate women's earnings or because the laws involved were amenable to gender-neutral alternatives, or both. Second, I cede the dissent's point to a large degree, but with a caveat. The dissent's assertion that I "equate[] strict scrutiny with the intermediate scrutiny that [Justice CAVANAGH] employ[s] in this case," *post* at 945, illustrates my point that the Supreme Court's intermediate scrutiny jurisprudence is inconsistent and difficult to apply. Justice CAVANAGH's analysis resembles strict scrutiny in part because the Supreme Court's analyses resemble strict scrutiny, particularly in the post-*Kahn* marital arena. In *Engineering Contractors Ass'n*, the Eleventh Circuit addressed this very issue as a problem existing across the board in intermediate scrutiny cases. The court began by noting the Supreme Court's use throughout its *VMI* opinion—which invalidated maintenance of a single-sex education program at the Virginia Military Institute—of the phrase "exceedingly persuasive justification" to describe the substantial relation test. *Engineering Contractors Ass'n,* 122 F3d at 907. The Eleventh Circuit opined that the phrase "connotes more intense scrutiny than do customary descriptions of intermediate scrutiny," citing Justice Scalia's dissent in *VMI*. *Id.* Indeed, in *VMI*, Justice Scalia accused the high court of effectively adopting the strict scrutiny test for gender classifications. *VMI,* 518 US at 571 (Scalia, J.,

[24] A gender-based classification will not be upheld if its objective is "to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior . . . ." *Hogan,* 458 US at 725.

dissenting). Yet the *VMI* majority disclaimed doing so, *id.* at 532, and, in concurring in the result, Chief Justice Rehnquist explicitly counseled:

> While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. [*Id.* at 559 (Rehnquist, C.J., concurring in result).]

Accordingly, the Eleventh Circuit declined to apply a new, stricter standard in cases addressing gender-based classifications, stating: "Unless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective." *Engineering Contractors Ass'n,* 122 F3d at 908. I similarly conclude that, although "[i]t is unfortunate that the Court [has] introduce[d] an element of uncertainty respecting the appropriate test" in cases involving gender-based classifications, *VMI,* 518 US at 559 (Rehnquist, C.J., concurring in result), the Supreme Court's formally enunciated test remains: Is the classification substantially related to an important governmental objective? Unless and until the Court says otherwise, I believe that we are bound to uphold our Legislature's choice to retain dower, because it passes the substantial relation test and also may reasonably be distinguished from the cases involving marital laws cited by the dissent.

IV. CONCLUSION: THE UNIQUE STATUS OF DOWER IN MICHIGAN

I close by directly addressing the dissent's opening question: "whether Michigan alone among the 50 states may continue to confer a dower right on women, without offering a corresponding right to men." *Post* at 927. In answering "Yes," I have already explained that Michigan women have historically relied on dower and that Michigan falls well behind the national average for wage-equality between the sexes.[25]

I also note that Michigan courts join courts throughout the nation in employing a strong presumption of constitutionality in favor of a legislature's acts. As we observed in *Sears v Cottrell,* 5 Mich 251, 259 (1858):

> No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and it is only when they *manifestly* infringe some provision of the constitution that they can be declared void for that reason. In

[25] See n 7 of this statement.

> cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act.

As the judicial branch of government, "[w]e are duty bound under the Michigan Constitution to preserve the laws of this state . . . ." *People v Bricker,* 389 Mich 524, 528 (1973). Accordingly, "[w]e exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc,* 470 Mich 415, 422 (2004). Indeed, as the dissent acknowledges, "declaring a statute unconstitutional is ' "the gravest and most delicate duty that this Court is called on to perform" ' . . . ." *People v Lynch,* 410 Mich 343, 352 (1981), quoting *United States v Raines*, 362 US 17, 20 (1960), in turn quoting *Blodgett v Holden*, 275 US 142, 148 (1927) (Holmes, J.). See *post* at 928.

To this end, I would also note that Michigan is not alone in concluding that dower is constitutional. Courts in Utah and Florida upheld dower in response to claims that it violated equal protection, albeit before the intermediate scrutiny standard of review was established for gender-based classifications. *In re Baer Estate,* 562 P2d 614 (Utah, 1977), app dis for want of a substantial federal question 434 US 805 (1977);[26] *In re Rincon Estate,* 327 So 2d 224 (Fla, 1976).[27] Moreover, the fact our sister states have since amended their dower laws, *post* at 927 n 1, does not render such laws *unconstitutional*. Although Michigan alone continues to confer a dower right on widows only, the nationwide consensus or polling approach to applying the mandates of the Fourteenth Amendment has been criticized for good reason.

United States Supreme Court Justice Harlan counseled that, when courts endeavor to "ascertain those 'immutable principles . . . of free government which no member of the Union may disregard,' " they must

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[26] In *Baer Estate,* 562 P2d at 616, the Utah Supreme Court noted "a presumption of constitutionality of legislative enactments" and concluded that the "Utah statute serves a policy of long standing which cushions the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," citing *Kahn*.

[27] In *Rincon Estate,* 327 So 2d at 226, the Florida Supreme Court concluded that "where a statute's differing treatment of widows and widowers rests on some ground of reasonable difference having a fair and substantial relation to the object of the legislation, that statute does not violate the equal protection clauses of our statute and federal constitutions." The court also noted that the "drafters of the 1968 [Florida] Constitution intended to vest authority in the Legislature to make a distinction between the sexes with respect to providing rights of a wife in the property of her husband without requiring that the husband be granted reciprocal rights" because the constitution provided that " 'dower *or* curtesy may be established and regulated by law.' " *Id*.

do so by examining the constitutional language and maintaining "due recognition of constitutional tolerance for state experimentation and disparity . . . ." *Duncan v Louisiana,* 391 US 145, 176 (1968) (Harlan, J., dissenting), quoting *Holden v Hardy*, 169 US 366, 389 (1898). He observed that the " 'Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line.' " *Duncan*, 391 US at 177, quoting *Missouri v Lewis*, 101 US 22, 31 (1879). Thus, the Fourteenth Amendment does not "impose nationwide uniformity in details . . . ." *Duncan*, 391 US at 177. Chief Justice Burger offered a similar observation in *Baldwin v New York,* 399 US 66, 77 (1970) (Burger, C.J., dissenting), quoting the *Baldwin* majority: "That the 'near-uniform judgment of the Nation' is otherwise than the judgment in some of its parts affords no basis for me to read into the Constitution something not found there." Finally, in his compelling dissent in *New State Ice Co v Liebmann,* 285 US 262, 311 (1932), Justice Brandeis cautioned:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Perhaps most tellingly, he added: "The remedy might bring evils worse than the present disease." *Id*. at 309. Although other states have chosen not to retain gender-based dower laws, nothing in the constitution prohibits Michigan from doing so. Rather than being *novel* or a new *experiment*, dower has *become* unique to Michigan, but this does not mean that it has become unconstitutional. Our Legislature made an explicit contemporary decision to defy the norm by retaining dower even though the nationwide Uniform Probate Code, on which our EPIC is modeled, abolishes dower. I would uphold our Legislature's conclusion that our age-old dower scheme still serves an important governmental objective and remains necessary in the economic and social climate of *our* state.

In sum: Yes, Michigan may continue to confer a dower right on women even if it is the only state to do so. Although imperfect, the dower scheme is substantially related to the particular economic disadvantages suffered disproportionately by widows in Michigan. Its substantial relationship to these real-world differences between male and female surviving spouses confirms that dower is not merely rooted in archaic stereotypes. Finally, dower is distinguishable from the laws cited by the dissent because dower does not denigrate women or devalue their earnings. Moreover, no

existing nondiscriminatory process can provide widows with similar protection. Accordingly, in my view, our Court would not be constitutionally justified in depriving the Legislature of dower as a unique tool providing a minimum level of security for widows.

WEAVER, J. I join the statement of Justice CORRIGAN.

CAVANAGH, J. (*dissenting*). I respectfully disagree with the majority's determination that the question presented in this case should not be reviewed by this Court. Respondent raises an equal protection challenge to two Michigan statutes that establish a widow's right to dower while denying the same benefits to widowers. In my estimation of the United States Supreme Court's modern constitutional jurisprudence, this statutory scheme's use of a gender-based classification violates the Equal Protection Clause of the United States Constitution. The question presented is jurisprudentially significant, as it asks whether Michigan alone among the 50 states may continue to confer a dower right on women, without offering a corresponding right to men.[1] I believe that this Court should issue an opinion on the merits to resolve this matter.

Petitioner Sharon Miltenberger was married to James Miltenberger when he died in January 2004. However, she had filed for divorce in October 2003 and had moved out of the marital residence. In November 2003, while the divorce was pending, James Miltenberger quitclaimed two parcels of land to respondent Sandra Swartz, his daughter from a previous marriage. James Miltenberger had been the legal titleholder of the two parcels, which contained buildings that had been used as his office and the marital residence. James Miltenberger executed a will in January 2004 that devised his entire estate to Swartz, leaving his two other children and his wife nothing; he died on January 18, 2004. Sharon Miltenberger (hereafter Miltenberger) petitioned for probate and the appointment of a personal representative. Probate proceedings determined that the value of the estate's assets totaled $16,745.48, but after subtracting expenses, the balance was $8,823.06. The parcels conveyed by James Miltenberger were not included in the inventory of the estate. Miltenberger filed a petition to make a late election to take her dower right under MCL 700.2202(2) and MCL 558.1. Swartz moved for summary disposition, seeking, in relevant part, to dismiss the petition as untimely and as unconstitutional on the ground that permitting a widow to make a dower election would violate the equal protection clauses of the Michigan and United States constitutions. The probate court permitted Miltenberger to elect to take her dower right, concluding that the dower election was neither untimely nor unconstitutional, and denied Swartz's motion for summary disposition. Swartz appealed on the constitutional ground, and the Court of Appeals affirmed the probate court's decision in a published opinion. *In re Miltenberger Estate*, 275 Mich App 47 (2007).

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[1] Although it is of no constitutional moment that Michigan stands alone among the 50 states with regard to gender-based dower, I believe that this circumstance likely reflects the thinking of our sister states that such a distinction cannot properly be drawn in light of the Supreme Court's equal protection decisions of the past two generations.

As a preface to considering the constitutionality of Michigan's dower statutes, I recognize that it is a matter of considerable consequence for a judge to strike down an enactment of the Legislature. "[D]eclaring a statute unconstitutional is the gravest and most delicate duty that this Court is called on to perform." *People v Lynch*, 410 Mich 343, 352 (1981) (citations and quotation marks omitted). However, with regard to the meaning of the United States Constitution, the decisions of the United States Supreme Court are controlling. *Cooper v Aaron*, 358 US 1, 18 (1958). Several United States Supreme Court cases that have scrutinized laws containing gender distinctions lead me to conclude that Michigan's gender-based dower scheme cannot be sustained.

The Equal Protection Clause of the United States Constitution declares that "[n]o State shall make or enforce any law which shall- . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV.[2] Swartz challenges the Michigan statutory scheme that gives widows, but not widowers, a right and option to elect dower, arguing that it is an unjustified gender-based classification that violates equal protection.

It is readily apparent that the statute recognizing dower interests, MCL 558.1, discriminates on the basis of gender. The statute provides: "The widow of every deceased person, shall be entitled to dower, or the use during her natural life, of 1/3 part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof." The statute recognizes a particular property right available only to widows, who are, by definition, always women. There is no corresponding property right available to widowers, who are always men. Michigan's Estates and Protected Individuals Code (EPIC), MCL 700.1101 through 700.8102, uses an identical gender classification in its treatment of surviving spouses. EPIC provides that if an individual died testate, the surviving spouse may elect one of the following:

> (a) That the spouse will abide by the terms of the will.
>
> (b) That the spouse will take 1/2 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by 1/2 of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death.
>
> (c) If a widow, that she will take her dower right under sections 1 to 29 of 1846 RS 66, MCL 558.1 to 558.29. [MCL 700.2202(2).] [3]

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[2] Given the conclusion that the dower statutes violate the Equal Protection Clause of the United States Constitution, pursuant to the United States Supreme Court's interpretation of this clause, it is unnecessary to address whether the statutes also violate the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2.

[3] MCL 700.2202(1) provides a similar choice for a widow whose husband died intestate.

Thus, under MCL 700.2202(2), a male surviving spouse may choose to abide by the terms of his deceased wife's will, or he may take the elective share described in subdivision b. A female surviving spouse has both of the options that are available to men, but has the additional option to elect to take her dower right.

Given that these two statutes operate by classifying individuals on the basis of gender, the question is whether that classification violates the Equal Protection Clause of the United States Constitution. The level of scrutiny courts must apply to such classifications is well established and is referred to as "intermediate scrutiny." *Clark v Jeter*, 486 US 456, 461 (1988). A party seeking to uphold a statute that discriminates on the basis of gender has the burden of showing an " 'exceedingly persuasive justification' " for the classification. *Mississippi Univ for Women v Hogan*, 458 US 718, 724 (1982) (citation omitted). "The burden . . . is on those defending the discrimination to make out the claimed justification . . . ." *Wengler v Druggists Mut Ins Co,* 446 US 142, 151 (1980). "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v Boren*, 429 US 190, 197 (1976). In cases involving gender-based classification, the United States Supreme Court has counseled that

> [a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. [*Hogan*, 458 US at 724-725.]

The Court has also cautioned that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v Orr*, 440 US 268, 283 (1979). "The State's justification for [a gender-based] classification 'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.' " *Nevada Dep't of Human Resources v Hibbs,* 538 US 721, 729 (2003) (citation omitted). In sum, to justify a gender-based classification, the proponent of the discriminatory statute must show an exceedingly persuasive justification for the classification, which requires, at the least, that the classification serves important governmental objectives and substantially relates to the achievement of those objectives. *Nguyen v Immigration & Naturalization Service*, 533 US 53, 70 (2001).

As a preliminary matter, it is notable that the United States Supreme Court has been the *most* unyielding in its rejection of gender distinctions in the realm of marital law. See, for example, *Wengler,* 446 US 142 (striking down Missouri's workers' compensation provision that required a widower to prove dependence on his wife's earnings before he could

receive death benefits, but did not require a widow to prove dependence on her husband's earnings before she could receive death benefits); *Orr,* 440 US 268 (striking down Alabama's alimony statutes that provided that husbands, but not wives, may be required to pay alimony upon divorce); *Califano v Goldfarb,* 430 US 199 (1977) (striking down the federal Old-Age, Survivors, and Disability Insurance Benefits program, which required a widower to prove dependence on his wife to receive survivors' benefits, but did not require a widow to prove dependence on her husband to receive survivors' benefits); *Weinberger v Wiesenfeld,* 420 US 636 (1975) (striking down the Social Security Act provision that provided benefits to widows with minor children, but not widowers); *Frontiero v Richardson*, 411 US 677 (1973) (striking down a federal statute that required a servicewoman's husband to prove dependency in order to obtain increased quarters allowances and medical and dental benefits, but did not require a serviceman's wife to prove dependency to obtain these same benefits); and *Reed v Reed,* 404 US 71 (1971) (striking down an Idaho statute that provided that the husband must be preferred over the wife for the purpose of appointing their son's estate administrator). In such cases, encompassing most of the significant gender discrimination cases of the past two generations, the Court has repeatedly struck down gender distinctions in areas affecting married persons.

Mindful of this precedent, I turn to the first step in equal protection analysis—examining the professed governmental objectives served by providing a dower right to widows but not widowers. There are several potential objectives arguably served by this statutory scheme: offsetting the disabilities of coverture, cushioning the financial effect of spousal loss on the gender that is particularly burdened by such a loss, and remedying historic economic discrimination against women.

The governmental objective of offsetting the disabilities of coverture is easily dismissed given the modern status of married women, but it nonetheless provides relevant historical context. The common law imposed severe economic disadvantages on married women. The term "coverture" was used to describe the condition of being a married woman, which carried the particular disabilities of that status.[4] This Court described some of the disabilities that attached to coverture in *Tong v Marvin*, 15 Mich 60, 66 (1866):

> The control which a husband has over the person and estate of his wife at the common law is so great and so liable to abuse that it has for a long time been the subject of complaint, and of frequent interposition by courts of equity. He had (1) The control of her person, and the right to appropriate her earnings to his own use; *(2) He became by the marriage the owner of such personal estate as she then possessed, and of all that she should thereafter acquire during coverture; (3) He had a right to reduce her choses in action to possession, and to dispose of her chattel interests in lands to his*

[4] Black's Law Dictionary (7th ed).

> *own use;* (4) He became vested with her estate of inheritance during the coverture, and if he survived her, and issue capable of inheriting it had been born to them, he had a life estate therein; and (5) In case of their separation, he had the better right to the control and custody of the children of the marriage. [Emphasis added.]

As relevant here, coverture stripped a married woman of any individual rights to property she owned before the marriage or acquired during the marriage. *Tong* also described "the corresponding rights of the wife" at common law as:

> (1) A right to support, and to have her debts before marriage paid by the husband; and, *(2) A life interest in the one-third part of his estates of inheritance if she survived him.* To these equity added, (3) An equity to a reasonable settlement, to be made from the property brought by her to the husband, for the support of herself and her children . . . . [*Id.* (emphasis added).]

At common law, dower, a life interest in 1/3 of a husband's estates of inheritance, was designed to offset the burdens of coverture. A woman who owned property before marriage lost ownership of that property when she married, which was a potentially significant economic loss. Once married, any property a woman acquired, such as by inheritance, became the husband's property. In place of the property rights lost, a woman acquired a life interest in 1/3 of her husband's real property. Though not necessarily an equal exchange, dower partially offset the economic loss a woman potentially endured by virtue of marriage. Dower was also a device to protect a surviving spouse against the conveyances or debts of the other spouse. Atkinson, Law of Wills (2d ed), p 107. If a woman's husband conveyed any real property during his lifetime, the conveyance was subject to the widow's dower right, unless she had relinquished it. 15 Powell, Real Property, § 85.20[2][c], p 379. Thus, because of dower rights, a husband cannot convey perfect title to his real property unless his wife consents. In addition, "[s]ince a surviving spouse generally takes a dower or curtesy interest free from debts, these interests may offer more protection than other spousal protection provisions." *Id.* Thus, dower prevented a widow from being forced from her home by her husband's creditors or because her husband had conveyed the property without her consent.

Many of the purposes of dower recognized at common law have vanished with the advancement of women's economic and social rights. Beginning in the nineteenth century, married women's property acts were passed to remove the disabilities of coverture. Married women were given the power to convey and acquire real property, retain ownership of property owned before or during the marriage, sue and be sued as

separate legal entities, and enter into contracts.[5] The 1963 Michigan Constitution fully abolished the disabilities of coverture.[6] To the extent that dower's purpose was to balance the restrictions coverture placed on a married woman's ability to own property, modern laws have eliminated the need for this objective. Accordingly, this particular purpose of dower cannot serve as an important governmental objective.

Of course, proponents of the classification scheme, including Miltenberger, have advanced alternative objectives served by the dower provisions. In considering these objectives, it is prudent to mind the admonishment of the United States Supreme Court that "[t]he justification [for a classification] must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v Virginia*, 518 US 515, 533 (1996). The statutes at issue here are little more than recitations of the common law; thus, whether dower under these statutes serves a different or broader purpose than dower served at common law is somewhat questionable. However, there is some indication that at common law, dower served more purposes than simply compensating for the disabilities of coverture. Dower may "provide a surviving spouse with a source of support when the other spouse dies, in order to ensure that the surviving spouse will not be left disinherited and destitute . . . ." 28 CJS, Dower and Curtesy, § 2, p 106. Dower has also been characterized as "a reasonable product of a society in which most wealth consisted of land, and in which there was a desire to provide at least a modest social

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[5] Section 1 of 1855 PA 168 provided

> [t]hat the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner and with the like effect as if she were unmarried.

See also 1911 PA 196; 1917 PA 158.

[6] Const 1963, art 10, § 1 provides:

> The disabilities of coverture as to property are abolished. The real and personal estate of every woman acquired before marriage and all real and personal property to which she may afterwards become entitled shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be dealt with and disposed of by her as if she were unmarried. Dower may be relinquished or conveyed as provided by law.

security for surviving widows." 2 Powell, Real Property, § 15.04[1], p 57. Thus, there is support for the notion that common-law dower served the broader purpose of providing a means of support for widows, who were presumed to be financially dependent on their husbands, and, therefore, particularly vulnerable after losing a spouse.

Further, the adoption of the current dower provisions indicates that the Legislature believed that dower served more than just the purpose it served at common law. Even after the disabilities of coverture were entirely abolished by the 1963 constitution, the Legislature did not repeal Michigan's dower provisions. In 1999, the Legislature repealed the Revised Probate Code (which recognized dower) and replaced it with EPIC, which bore more resemblance to the Uniform Probate Code (UPC). The UPC does not contain any provisions recognizing dower. The EPIC provisions were introduced in 1997 in Senate Bill 209; when the bill was originally drafted, it specifically abolished the right of dower. But the bill was amended to retain the right of dower and a widow's right to elect to take dower; the Legislature enacted this version of the bill. In the absence of any legislative statement of purpose, it must be assumed the Legislature believed that dower still served the purpose of providing a means of support for needy surviving spouses. Dower could also serve the related purpose of compensating women for past discrimination and lower earnings during marriage, which often left them more vulnerable than men following the death of a spouse. The United States Supreme Court has recognized "that assisting needy spouses is a legitimate and important governmental objective." *Orr*, 440 US at 280. Also, "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." *Califano v Webster*, 430 US 313, 317 (1977). Thus, assuming that gender-based dower advances the purposes of supporting needy surviving spouses and remedying past discrimination, it serves important governmental objectives.

After determining that the governmental objectives are legitimate and important, the discriminatory means employed must be evaluated to determine whether they are substantially related to those objectives. A close relationship between discriminatory means and valid governmental objectives is required "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan*, 458 US at 725-726. The United States Supreme Court has criticized and invalidated statutes based on " 'archaic and overbroad' " generalizations that "employ[] gender as an inaccurate proxy for other, more germane bases of classification." *Craig*, 429 US at 198 (citation omitted).

For example, in *Goldfarb*, 430 US at 216-217, the Court held that the federal Old-Age, Survivors, and Disability Insurance Benefits program, which required a widower to prove dependence on his wife to receive

survivors' benefits, but did not require a widow to prove dependence on her husband to receive survivors' benefits, violated the Equal Protection Clause. The Court explained that

> the gender-based differentiation created by [the statute]—that results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men—is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic and overbroad" generalizations or "old notions," such as "assumptions as to dependency," that are more consistent with "the role-typing society has long imposed" than with contemporary reality. [*Id.* at 206-207 (citations omitted).]

With these principles in mind, the next question is whether the dower statutes' gender-based classification and the governmental objective of supporting needy surviving spouses are substantially related. It is clear that the gender-based classification relies on generalizations about the economic status of men and women, thereby employing gender as a proxy for need. Rather than limiting dower to surviving spouses who demonstrate that they are indeed left financially vulnerable after the death of a spouse, the dower statutes simply permit all women, but not men, to elect dower. The implicit assumption in this system is that gender can be employed as a proxy for need, and that directing provisions toward women will necessarily reach those surviving spouses who are left vulnerable after losing a spouse.

To justify equating gender with need, Miltenberger has presented several statistics showing that women are more likely to be in poverty than men. For example, Miltenberger notes that women in general were 37 percent more likely than men to be in poverty in 2004, while women over 65 were 71 percent more likely than men to be in poverty.[7] These measures are based on census data from that year, which report that 12 percent of women over 65 were in poverty, compared with 7 percent of men over 65. The statistics that Miltenberger has produced, which show a general correlation between gender and poverty, do not justify substituting gender for need. Intermediate-level scrutiny requires a much closer connection before a law can use gender to presume that a particular condition is met.

This is not the first time general statistics have been proffered to justify a discriminatory scheme. The United States Supreme Court has offered guidance on this matter. The Court has refused to rely on generalizations even if those generalizations are supported by statistics. In *Weinberger*, 420 US at 653, the Court held that the Social Security Act provision that provided benefits to widows, but not widowers, violated the equal-protection guarantee of the Fifth Amendment's Due Process Clause. The Court explained:

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[7] Legal Momentum, Reading Between the Lines: Women's Poverty in the United States, 2004 (2004), p 1.

> Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support. [*Id*. at 645 (citation omitted).]

While in some contexts the term "generalization" might be understood to mean a notion that is entirely unverified by evidence, the Court has understood this term to encompass even notions that *are* supported by some evidence. As one commentator has explained:

> [T]he Court has recognized that stereotypes, although empirically grounded, may be rational and impermissible at the same time. . . . [Therefore,] even when the generalization is empirically supported, the Court has rejected statutes that classified overbroadly by gender if more accurate and impartial distinctions might have been made. [Alexander, *Nguyen v INS: The supreme court rationalizes gender-based distinctions in upholding an equal protection challenge*, 35 Creighton L R 789, 844-845 (2002).]

The Court has made it clear that a "substantial relationship" requires a palpable connection between gender and the trait for which it serves as a proxy; this is evident from the traits that have been held *not* to be substantially related to gender, even though a substantial correlation exists. For example, the Court invalidated an Oklahoma statutory scheme that prohibited the sale of beer to males under the age of 21 and females under the age of 18, in which the proffered rationale was traffic safety. *Craig*, 429 US at 192, 199-200. Consulting the statistics provided by the proponents of the classification, the Court noted that "[t]he disparities in 18-20-year-old male-female arrests [in 1973] were substantial for both categories of offenses: 427 versus 24 for driving under the influence of alcohol, and 966 versus 102 for drunkenness." *Id*. at 200 n 8. The most relevant survey, the study of alcohol-related driving offenses among 18- to 20-year-olds, "broadly establish[es] that .18% of females and 2% of males in that age group were arrested for that offense." *Id* at 201. Yet, the Court concluded that although the correlation was not statistically trivial, "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.' " *Id*. at 201-202. Moreover, a correlation of just 2% was far more tenuous than other correlations that have been rejected as insufficient. "Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this." *Id*. at 202. For example, in *Reed*, 404 US at 71, the Court surmised that the state's "apparent premise that women lacked experience in formal business matters (particularly compared to men) would have proved to be accurate in substantially more than 2% of all cases." *Craig*, 429 US at 202 n

13. Despite the demonstrated validity of certain generalizations, the Court had found the "empirical defense of mandatory dependency tests for men but not women to be unsatisfactory, even though we recognized that husbands are still far less likely to be dependent on their wives than vice versa." *Id*. Thus, the statistics presented in *Craig* did not establish that gender "represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id*. at 204. Indeed, "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id*. The Court concluded that "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups." *Id*. at 208-209.

In the case at hand, the difference in poverty rate between the genders fails to justify employing gender as a proxy for need under *Craig*. In 2004, 12 percent of women over 65 were in poverty, while only 7 percent of men were in poverty.[8] This, of course, reflects a verifiable disparity. But using gender in order to reach the 12 percent of women who are in poverty is similar to using a gender-based ban on alcohol to reach the 2 percent of men who would drink and drive. *Craig*'s admonition that even correlations that are substantially more accurate than 2 percent have failed intermediate scrutiny is instructive, and compels my conclusion in this case. To say that gender is an imperfect proxy for need is an understatement. It is a grossly inaccurate proxy in that it is potentially overinclusive by 88 percent—namely, it extends dower to the 88 percent of elderly women who *do not* live in poverty. At the same time, it summarily denies dower to the 7 percent of elderly men who are in poverty. The correlation presented by Miltenberger is similar to that established in *Craig*; both show a verifiable connection between gender and a characteristic, but are constitutionally insufficient to establish a legitimate and accurate proxy for classification purposes.[9]

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[8] It is worth noting that the proffered statistics report the poverty rate among *individuals over 65 years of age*, not specifically among *surviving spouses*. While widows and widowers quite naturally tend to be elderly, it would be advisable to use these statistics cautiously in light of their inherent inaccuracies. Moreover, an individual's income, as calculated by the census bureau, is not a definitive assessment of need, particularly the type of need that would be addressed by the remedy of dower. Specifically, the income calculation does not account for the value of assets, such as a home, that are owned by the individual. Similarly, the census bureau's poverty calculation does not include capital gains or the value of assets owned by an individual. <http://www.census.gov/hhes/www/poverty/povdef.html> (accessed July 17, 2008).

[9] Of course, being in poverty is only one way of measuring whether a surviving spouse is particularly needy after losing a spouse. In fact, Miltenberger's statistics reveal that men experience a greater propor-

In sum, because widows are free to elect dower without regard to need, the dower provision potentially benefits all widows, whether needy or not, but likewise deprives all needy widowers of the same protection. Permitting widows, but not widowers, to elect dower is not substantially related to the objective of providing support for needy surviving spouses because it is overinclusive with respect to widows but underinclusive with respect to widowers.

Further, the Court has held that using gender as a proxy for need is unwarranted when nondiscriminatory means of determining need are equally available. In *Wengler*, 446 US at 152, the United States Supreme Court held that Missouri's workers' compensation provision that required a widower to prove dependence on his wife's earnings before he could receive death benefits, but did not require a widow to prove dependence on her husband's earnings before she could receive death benefits, violated the Equal Protection Clause. The Court explained that although "[p]roviding for needy spouses is surely an important governmental objective, . . . the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need." *Id.* at 151. The Court explained that the only justification for the disparate treatment was "the assertion that most women are dependent on male wage earners and that it is more efficient to presume dependency in the case of women" and to only require those few men who are financially dependent on their wives to prove such dependency. *Id.* However, the Court held that the bare assertion of "administrative convenience" does not justify gender-based discrimination. *Id.* at 151-152.

Similarly, in *Orr,* the Court invalidated a statutory scheme providing that husbands, but not wives, may be ordered to pay alimony. *Orr*, 440 US at 270. The Court acknowledged the validity of two legislative purposes of the statutory scheme: assisting needy spouses (using gender as a proxy for need), and compensating women for past discrimination. *Id*. at 280. Nevertheless, the Court determined that the scheme was invalid. The Court observed that "even if sex were a reliable proxy for need, and

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tional loss of income than women after losing a spouse: In 2005, the median income of married men was $39,789, while the median income of widowed men was $20,116, a reduction of 49 percent. Marital Status—All Races 18 Years Old and Over by Median Income and Sex: 1974 to 2006, <http://www.census.gov/hhes/www/income/histinc/p13ar.html> (accessed June 16, 2008). By contrast, the median income of married women was $20,236, while the median income of widowed women was $14,961, a reduction of 26 percent. *Id*. These statistics are only offered by way of illustration; I acknowledge that these data are rudimentary and do not account for the effect that variables such as age and retirement would have on earnings independent of losing a spouse. Regardless, they call into question Miltenberger's assertion that gender can predict with sufficient accuracy whether losing a spouse leaves an individual in an economically vulnerable position.

even if the institution of marriage did discriminate against women," the statute already provided for individualized hearings at which the parties' financial circumstances were considered. *Id*. at 281-282. Therefore, "[n]eedy males could be helped along with needy females with little if any additional burden on the State. In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy." *Id*. at 281. Similarly, individualized hearings could determine which women were actually discriminated against, and conversely, which family units left the husband dependent on the wife. *Id*. at 281-282. The Court observed that the statutory purposes could be accomplished without the gender-based classification, at no additional cost to the state. *Id*. at 282. Accordingly, " 'the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids,' . . . and the effort to help those women would not in any way be compromised." *Id*., quoting *Weinberger*, 420 US at 653. The Court concluded that "[w]here . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex." *Orr*, 440 US at 283.

At the very least, *Orr* teaches that gender classifications may not be gratuitous; when there is a nondiscriminatory method for achieving the same objective desired by the government, using gender as a broad proxy for reaching that objective is unwarranted. The dower provisions cannot survive *Orr*'s pronouncement. If the objective of the dower provisions is to provide security for needy surviving spouses, nondiscriminatory methods of achieving this objective would serve this goal equally well, if not better.[10] Dower provisions that apply to both males and females equally would serve the objective of providing security for needy spouses, at no additional cost or burden to the state. Providing a dower right to widowers would not affect or impair widows' dower rights. Dower provisions that apply to those spouses who demonstrate an actual need for dower would also serve the objective of providing security for needy spouses. Because the state's objectives could be served by nondiscriminatory means, the dower provisions' gender classification is gratuitous and constitutionally impermissible under *Orr*.

Further, the discriminatory dower provisions are not substantially related to the objective of providing for needy spouses because they are poorly designed to achieve this objective. In most cases, dower provides less economic benefit to a widow than the elective share described by

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[10] While I will not today determine the constitutionality or feasibility of a hypothetical gender-neutral dower scheme, in response to Justice CORRIGAN's suggestion that the Legislature may be precluded from adopting a gender-neutral dower scheme because such a scheme would "compromise vested property rights," *ante* at 918, I simply note that perhaps the Legislature could draft a scheme that would avoid Justice CORRIGAN's concerns by applying gender-neutral dower prospectively only.

MCL 700.2202(2)(b). The dower provisions only afford meaningful assistance in circumstances that are unlikely to arise in modern times. As commentators have noted, "[w]hile dower may have worked fairly well in cases of the more fortunate families in agrarian society, it is not usually adequate in the present condition of urban living in which the average person owns nothing except personalty and perhaps a single residence." *Atkinson, supra* at 107. Dower is "an inadequate form of social security in current time since it only gives rights in realty, while current wealth is concentrated in personal property." 2 Powell, Real Property, § 15.08, p 95-96. Dower does not directly remedy the economic conditions of widows, unlike a property-tax exemption or increased social security benefits. Dower potentially provides a widow a place to live or a source of rental income, but this benefit is contingent on having been married to a landowning husband. It would stand to reason that many of the neediest widows had been married to men who did not own real property, so dower does not aid them at all when they lose their spouse. For dower's classification to be substantially related to the goal of providing assistance to needy surviving spouses, it must demonstrably *serve* that goal; given modern realities, it does not.

In contrast to dower's limited utility in modern times, it is telling that dower served to directly remedy a number of disabilities of coverture that existed at common law. The close fit between dower's remedy and the disabilities of coverture, compared with the tenuous fit between dower's remedy and the circumstances of modern needy surviving spouses, leads to the inference that dower is, and has always been, truly designed to substantially relate to offset the disabilities of coverture. Contending that dower now substantially relates to remedying modern economic disparities, even though dower has remained unchanged since common law times, is indicative of a justification that has been advanced "*post hoc* in response to litigation." *Virginia*, 518 US at 533.

In sum, dower does not substantially relate to the objective of aiding surviving spouses who are particularly vulnerable after the loss of a spouse because its classification employs a grossly overbroad proxy to reach that population, while gender-neutral provisions would serve the objective just as well. Moreover, dower does not adequately serve the particular objective that it ostensibly addresses.

Miltenberger has offered additional objectives ostensibly served by dower, such as remedying economic discrimination women have suffered during marriage. Miltenberger argues that widows are more likely than widowers to be needy following the death of a spouse because married women generally earn less money than married men. But like the goal of assisting needy surviving spouses, the provision's classification does not substantially relate to this objective. Miltenberger has presented statistics showing that married women earned a median income of $20,236 in 2005, while married men earned a median income of $39,789.[11] Miltenberger notes that this demonstrates that the median income of married

[11] Marital Status, *supra*.

women was 51 percent of the median income of married men in 2005.[12] The census data referenced by Miltenberger establish that, generally, men earn more than women of the same marital status.[13] *Id*. Miltenberger argues that these statistics reflect that, despite progress toward equality, women are still economically disadvantaged relative to men and are left more vulnerable after losing a spouse because they have enjoyed less earning power during their married life and afterwards.

The value of these general statistics is questionable. As a threshold matter, the statistics Miltenberger has presented regarding income disparity suffer from the same limitations as those used to justify using gender as a proxy for need. Namely, the United States Supreme Court has warned that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Craig*, 429 US at 204. In addition, Miltenberger must demonstrate a gender-based difference within the narrow population reached by MCL 700.2202(2)—surviving spouses.[14] If the classification in § 2202(2) is justifiable, it must be justified by showing that gender is a valid proxy for need within this population. Thus, statistics showing the economic disparities present in the general population are of limited relevance to discerning whether the gender-based classification is substantially related to addressing an actual condition present in the population reached by § 2202(2).

However, considering only the evidence of disparate income among male and female surviving spouses, it is apparent that the correlation between gender and need is even weaker than the correlation between gender and alcohol-related driving offenses that was considered insufficient in *Craig*. In *Craig*, the Court refused to generalize on the basis of statistics that showed that the arrest rate among men was *11 times* higher than the arrest rate among women.[15] In the present case, the 2005 census data show that widowed men earned a median income that was about a third higher (34 percent) than the median income of widowed women. While one difficulty of engaging in this statistical analysis is that it does not permit us to compare truly equivalent units, a disparity by a

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[12] *Id*.

[13] It should be noted that this disparity should not necessarily be attributed to gender discrimination in the workforce. The fact that women generally make less money than men may sometimes arise out of decisions to stay at home or work part-time to care for their families.

[14] Technically, the group reached by MCL 700.2202(2) only includes surviving spouses of individuals who have died testate. This distinction is not significant, however, because MCL 700.2202(1) applies a synonymous gender classification to surviving spouses of individuals who have died intestate.

[15] Again, in *Craig*, 429 US at 201, the proponent of the classification showed that the arrest rate for women of that age was 0.18 percent while the corresponding rate for men was 2 percent.

factor of a third is statistically less drastic than the disparity by a factor of 11 that was rejected in *Craig*.

Moreover, if dower is meant to remedy the income gap between married women and married men, it only does so in a loosely related way—by providing a life estate in a portion of lands owned by a woman's husband—not by more direct means of reallocating income or other personal wealth. Dower is not designed to particularly compensate the economic discrimination women have suffered during their marriage; it is available to widows regardless of their need or employment history. As I have already noted, dower is beneficial only under uncommon circumstances, which occur independently from the circumstances of a particular woman's income history. The loose relationship between the rights afforded by dower and the objective of remedying past discrimination is apparent when contrasted with a compensatory scheme that was upheld by the United States Supreme Court. In *Webster*, the Court upheld a portion of the Social Security Act that provided different methods of computation of social security benefits based on the gender of the worker. A female worker could exclude from the computation of her average monthly wage three more lower-earning years than a male worker could exclude, resulting in a slightly higher average monthly wage and a correspondingly higher level of monthly old-age benefits for the retired female worker. *Id.*, 430 US at 315-316. The Court upheld the scheme, observing that "allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works *directly* to remedy some part of the effect of past discrimination." *Id*. at 318 (emphasis added). The scheme was constitutional because the remedy of disregarding lowest-earning years was directly related to the particular harm it sought to address—the demonstrated income disparity between the genders. By contrast, dower's remedy of providing a life estate in a portion of a husband's lands is only collaterally related to income disparity. In fact, the relationship is so attenuated that it again raises the inference that dower is truly only substantially related to the primary goal it served at common law—offsetting the disabilities of coverture. Because dower's gender-based classification is not substantially related to an important governmental objective, I would conclude that MCL 558.1 and MCL 700.2202(2) are unconstitutional.

The statute that recognizes dower interests, MCL 558.1, is unconstitutional on another ground. That provision creates a dower right in a husband's lands in favor of his widow, but no corresponding right in a wife's lands in favor of her husband. It impairs a married man's ability to convey real property, but does not similarly disadvantage a married woman. A married man cannot convey his property without the consent of his wife, but a married woman is free to convey her property without the consent of her husband. The ability to convey one's property without the consent of another is a valuable right; as Justice CORRIGAN observes, if a man wishes to convey property and his wife does not consent, presumably "the wife's contingent rights are reflected in a lower purchase price." *Ante* at 916. Permitting a married woman, but not a married man, to convey perfect title to property without spousal consent is a

classification that rests on "no more substantial justification than 'overbroad' generalizations, . . . such as 'assumptions as to dependency,' that are more consistent with 'the role-typing society has long imposed,' than with contemporary reality." *Goldfarb*, 430 US at 207 (citations omitted). The classification "reinforc[es] stereotypes about the 'proper place' of women and their need for special protection." *Orr*, 440 US at 283. The implicit assumptions of this classification reflect stereotypes—as that term is used by the United States Supreme Court—about both genders: that wives are dependent on their husbands, but husbands are not dependent on their wives; that men are more likely to abandon their spouses and must be reined in by a financial tether; that married men, not married women, tend to own property; and that husbands typically have the decision-making power in the marriage, while wives remain oblivious to their husbands' "business."[16] These notions are overbroad and constitutionally inadequate for justifying a gender-discriminatory scheme.

Although holding the gender-based dower provisions unconstitutional would reduce the options available to widows, it would not represent a consummate loss to women. Discriminatory statutes that are designed to benefit a traditionally disadvantaged group may actually impair the interests of individuals who contravene stereotypes. The dower provisions not only deny men a right that is granted to women, but also constrain the ability of landowning women to protect their husbands from their creditors after their death. Precluding men from asserting a dower right in their wife's lands provides female landowners fewer protections than male landowners. Moreover, to the extent that gender-based dower perpetuates stereotypes about men and women, both genders would benefit from its termination. Finally, even if this Court were to hold the dower provisions unconstitutional, the rights and equities at stake would likely warrant applying the holding with limited retroactivity, thus applying the decision only to the case at hand and to pending cases in which the same issue had been raised.

Aside from the jurisprudential significance of this case, I would also consider the merits because the Court of Appeals decided this case in a published opinion. *In re Miltenberger Estate*, 275 Mich App 47 (2007). The Court of Appeals erred in overlooking *Craig* and *Orr* in favor of *Kahn v Shevin*, 416 US 351 (1974), which upheld a Florida law that awarded widows a $500 property tax exemption while providing no corresponding benefit to widowers. While *Kahn* has not been overruled, it cannot be treated as purely analogous to the present case, because it was decided before the Court established that gender-based classifications are subject to intermediate-level scrutiny. *Kahn* applied the highly deferential rational-basis standard of review: "We deal here with a state tax law

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[16] The delegates to the 1961 constitutional convention were more forthright about the assumptions underlying dower than perhaps we are today, as illustrated by the remark that dower "mean[s] that *a husband who normally takes care of things* cannot get rid of all his property without his wife having to sign off." See *ante* at 905.

reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Kahn*, 416 US at 355. In addition, *Kahn* relied heavily on the fact that the provision at issue was a tax provision, stating, "We have long held that [w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Id*. (citation omitted).[17] *Kahn* has some application to the instant case, as both involve disparate treatment of widows and widowers; but it is critical to recognize that *Kahn* was not decided under the current standard of review for gender classification cases. Therefore, it is more appropriate to evaluate dower's constitutionality under the guidance of *Craig* and *Orr*, which applied intermediate scrutiny.

In addition, the Court of Appeals reference to dower's recognition in the Michigan Constitution is potentially misleading. The fact that the Michigan Constitution refers to dower, providing that "[d]ower may be relinquished or conveyed as provided by law," does not bear on whether the dower provisions enacted by the Legislature violate equal protection. Const 1963, art 10, § 1. The directive that dower may be relinquished or conveyed is not an endorsement of the institution of dower, but merely a notification that the Legislature may pass laws concerning the conveyance of dower rights. Accordingly, determining that Michigan's dower provisions violate equal protection does not fail to afford article 10, § 1 equal dignity; invalidating the discriminatory dower provisions does not infringe on Legislature's ability to pass laws concerning the relinquishment or conveyance of dower.

Before concluding, I wish to respond to Justice CORRIGAN's concurrence. Justice CORRIGAN concludes that Michigan's discriminatory dower statute is sufficiently related to its goals to survive equal protection review. But to reach this conclusion, she relies on an incorrect standard

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[17] Justice CORRIGAN appears to misconstrue this quotation as indicating that states have leeway in making classifications *unless* equal protection is imperiled, but it actually indicates that tax-related classifications enjoy particular deference when courts evaluate whether the classification violates equal protection. *Ante* at 912. For example, the United States Supreme Court observed that in an Equal Protection Clause challenge, "[t]he appropriate standard of review is whether the difference in treatment . . . rationally furthers a legitimate state interest. . . . This standard is especially deferential in the context of classifications made by complex tax laws." *Nordlinger v Hahn*, 505 US 1, 11. Accordingly, between *Kahn*'s reference to the deferential standard accorded to tax-related classifications and its use of rational-basis language, there is ample indication that *Kahn* applied a more deferential standard of review to the law at issue in that case than the intermediate scrutiny that applies to the provisions here.

of review, minimizes the relevance of controlling United States Supreme Court precedent, and eases the burden applicable to the proponent of the classification.

While Justice CORRIGAN purports to apply intermediate-level scrutiny, her analysis indicates otherwise. Her statement repeatedly insinuates that I would apply strict scrutiny by requiring dower to be *perfectly* related to its goals. In fact, I never hold dower to such a high standard or even once mention the word "perfect" in my discussion of the fit between the statute's classification and its goals. Meanwhile, Justice CORRIGAN wages a vigorous one-sided argument to counter the suggestion that dower must be perfectly related to its goals.[18] This argument is a red herring, both because it is nonresponsive to my position and because it implies that if equal protection does not require a *perfect* fit between a classification and its goals, then it only requires a rational one. Notably, Justice CORRIGAN's rhetoric is similar to language that the United States Supreme Court has employed when it has applied rational-basis scrutiny, the most deferential standard. "But where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' " *Nguyen,* 533 US at 77-78, quoting *Dandridge v Williams*, 397 US 471, 485 (1970).

Justice CORRIGAN's statement also purports to apply intermediate scrutiny, but essentially applies rational-basis review by following *Kahn* rather than heeding the directives set by *Orr* and *Craig*. I will not reiterate the arguments presented earlier, but I must address in particular the distinction drawn between this case and *Craig*. Justice CORRIGAN distinguishes *Craig* because the correlation between gender-based dower and its goals "rests on more than the mere 'loose-fitting generalities'. . . presented in *Craig*." *Ante* at 914. Justice CORRIGAN argues that, unlike *Craig*, this case presents "a clear correlation between widows and economic need, as well as past economic discrimination." *Ante* at 914. However, when the statistics presented in *Craig* are compared with the relevant statistics presented in this case, it is apparent that there is no sound basis for distinguishing *Craig*. See pages 936 and 940-941. Justice CORRIGAN also distinguishes *Craig* because the statute in *Craig* was designed to promote traffic safety, rather than the " 'laudatory purpose[]' " of remedying economic disparity. *Ante* at 913, quoting *Craig*, 429

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[18] "The dissent's point is well-taken, however, that gender is an imperfect proxy for need among surviving spouses." *Ante* at 903. "[T]he Court did not hold the Social Security Act benefits scheme at issue in *Weinberger* unconstitutional because it employed gender as an imperfect proxy for need." *Ante* at 915. "But dower is not *unconstitutional* merely because it is imperfect." *Ante* at 916. "[D]ower is not a perfect proxy for need or a complete remedy for past discrimination even within the relevant population of surviving spouses. But dower is not as imperfect—or as easily replaced—as the dissent suggests." *Ante* at 917. "Although imperfect, the dower scheme is substantially related to the particular economic disadvantages suffered disproportionately by widows in Michigan." *Ante* at 926.

US at 198 n 6. Justice CORRIGAN seems to imply that courts applying intermediate scrutiny are more deferential to statutes serving clearly laudatory purposes. If so, this distinction is unfounded. The *Craig* Court did not hold the statute unconstitutional because it failed to serve an important government objective; the Court held the statute unconstitutional because it was not substantially related to that objective. In this case, the validity of the dower provisions' objectives are not seriously disputed; the controlling inquiry is the sufficiency of the relationship between the objectives and the provisions' classifications. Accordingly, even though the statute in *Craig* was not aimed at remedying economic discrimination, the Court still applied intermediate scrutiny, and its consideration of the relationship between that statute's classification and its goals is entirely applicable to the instant case. The conclusion that Michigan's dower statute is not substantially related to any of its purported objectives is supported, and indeed compelled, by *Craig* and the modern Supreme Court cases applying intermediate scrutiny to gender-discriminatory statutes.

In addition, Justice CORRIGAN fails to recognize that this case involves a dispute that falls within a subclass of gender discrimination cases, i.e., gender discrimination in the realm of marital law. As discussed earlier, the United States Supreme Court has been the *most* unyielding in its rejection of gender distinctions in this particular subclass of cases. However, unlike race-based or nationality-based distinctions, in which strict scrutiny has resulted in virtually *no* tolerance for statutory distinctions between people of different races or nationalities, intermediate scrutiny has resulted in the acceptance of some gender-based distinctions, e.g., *Rostker v Goldberg*, 453 US 57 (1981) (upholding the Military Selective Service Act, which authorizes the President to require the registration for possible military service of males, but not females) —but simply not in the realm of marital law. Thus, when she equates strict scrutiny with the intermediate scrutiny that I employ in this case, *ante* at 903, she fails to account for the Court's treatment of the subclass of gender discrimination cases in the realm of marital law. In fact, Justice CORRIGAN effectively concedes that my approach is consistent with prevailing United States Supreme Court law when she observes that "Justice CAVANAGH's analysis resembles strict scrutiny in part because the Supreme Court's analyses resemble strict scrutiny, particularly in the post-*Kahn* marital arena." *Ante* at 923. This Court is bound to follow Supreme Court precedent, regardless of whether there are dissenting voices that criticize those decisions.

Finally, Justice CORRIGAN eases the burden on the proponent of the classification by supplying data and arguments in support of the classification beyond that which the proponent presented. Offering unsolicited assistance to the proponent of a classification is a hallmark of rational-basis review, not intermediate scrutiny. Courts applying rational-basis review must uphold classifications "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v Doe by Doe*, 509 US 312, 320 (1993). By contrast, under intermediate scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 US at 533. Justice CORRIGAN

does not adhere to this burden by considering *only* the data and arguments advanced by Miltenberger. For example, Justice CORRIGAN offers statistics relating to social security benefits that were never mentioned by Miltenberger. *Ante* at 908-909. Justice CORRIGAN also augments Miltenberger's position by *sua sponte* advancing the argument that the classification is justified because women have longer life expectancies, and by supplying a vital statistics report that was not referenced by Miltenberger. *Ante* at 909. Justice CORRIGAN acknowledges that she has eased Miltenberger's burden, but argues that such treatment is necessary because only a single private attorney presented a defense of the scheme. *Ante* at 902 n 1. I disagree with the proposition that the proponent's burden should be eased merely because the proponent is represented by a single private attorney. Moreover, even if the state had been better equipped to defend these statutes, I would not supply the state's arguments in this case simply because the state declined to participate. The constitutional issue presented was readily apparent from our grant order in this case. *In re Miltenberger Estate*, 480 Mich 976 (2007). The state could have filed an amicus curiae brief, but did not. MCR 7.306(D). The state, acting through the Attorney General, could have also moved to intervene at any stage of this case if it was interested in defending the constitutionality of gender-based dower, but it did not. See MCL 14.28, MCL 14.101.

In conclusion, I dissent from the order in this case that vacates our order granting leave to appeal. I would determine the merits of this case, holding that the gender-discriminatory dower scheme found in MCL 700.2202(2) and MCL 558.1 violates the Equal Protection Clause of the United States Constitution.

MARKMAN, J. I join the statement of Justice CAVANAGH.

Summary Disposition August 1, 2008:

BORGESS MEDICAL CENTER v RESTO, No. 133223. By order of October 3, 2007, the application for leave to appeal the January 9, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Ross v Auto Club Group* (Docket No. 130917). On order of the Court, the case having been decided on May 7, 2008, 481 Mich 1 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the majority opinion in *Borgess Medical Ctr v Resto*, 273 Mich App 558 (2007), and affirm the judgment of the Court of Appeals for the reasons stated in the concurring opinion. The motion for leave to file a brief amicus curiae by Phu Tran et al. is granted. Reported below: 273 Mich App 558.

Leave to Appeal Denied August 1, 2008:

PEOPLE v KILPATRICK, No. 136835; Court of Appeals No. 285794.

KELLY, J. (*concurring*). I concur in the decision to deny leave to appeal because the lower court decisions are consistent with MCR 2.003(B), the court rule regarding judicial disqualification. But I write to voice my

concern that, in its current form, the court rule is inadequate to assure that only unbiased judges hear cases.

MCR 2.003(B)(1) requires disqualification if "[t]he judge is personally biased or prejudiced for or against a party or attorney."[1] This Court has interpreted this language to require the party challenging a judge to show actual bias.[2] I question whether imposing such a heavy burden is appropriate, because clearly there are cases in which a party cannot show actual bias, yet judicial disqualification should be required.

For example, in *Special Wayne Prosecutor v Recorder's Court Judges*,[3] the underlying matter was the criminal prosecution of a Recorder's Court judge. The judge had been charged by a citizen's grand jury. It appeared that all the judges of the Recorder's Court were subjects of the grand jury investigation. On the prosecutor's motion, this Court ordered the recusal of the entire Recorder's Court bench.

It appears that this was a wise decision. If a sitting Recorder's Court judge had dismissed the charges against the indicted judge, the public reasonably could have seen it as an act of "self-protection." It could have been viewed as an attempt by the sitting judge to interfere with the criminal investigation into his or her own behavior.

But I question whether MCR 2.003(B) would permit us to order the recusal of an entire bench under the same circumstances today. The court rule did not exist when *Special Wayne Prosecutor* was decided.[4] No other Recorder's Court judges had been indicted when the motion came before this Court to recuse the entire bench. Nor was there any proof that other judges would be indicted. There was only speculation. Thus, there was no actual bias, only the appearance of bias. I think that the Court should amend MCR 2.003(B) to ensure that, if a case like *Special Wayne Prosecutor* were to arise again, it would be proper for us to disqualify the entire bench.

Amending the court rule to include an "appearance of bias" standard has support in the law beyond our jurisdiction. Federal law requires a federal judge to disqualify himself or herself "in any proceeding in which his impartiality might reasonably be questioned."[5] A number of states

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[1] MCR 2.003(B) provides other instances where disqualification is required. It is clear that none of them requires disqualification of the entire 36th District Court bench in this case. In addition, "where the requirement of showing actual bias or prejudice under MCR 2.003(B)(1) has not been met, or where the court rule is otherwise inapplicable, parties have pursued disqualification on the basis of the due process impartiality requirement." *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996). No due process violation has been alleged in this case.

[2] *Id.* at 495.

[3] *Special Wayne Prosecutor v Recorder's Court Judges*, 409 Mich 1119 (1980).

[4] The court rule became effective March 1, 1985. *Special Wayne Prosecutor* was decided in 1980.

[5] 28 USC 455.

provide similar standards for disqualification.[6] And members of this Court have voiced approval for a similar standard in the past.[7]

Unlike in the *Special Wayne Prosecutor* case, there is in this matter no suggestion of wrongdoing on the part of any of the judges of the 36th District Court. Moreover, I am not suggesting that I would vote to recuse the entire bench, even if the court rule clearly allowed it upon an adequate showing of the appearance of bias. But, as the rule now stands, the appearance of bias, however strong, will not be so much as considered by this Court. This situation must be remedied.

CAVANAGH, J. I join the statement of Justice KELLY.

WEAVER, J. I would grant immediate consideration and reverse the Court of Appeals and remand this case to the Court of Appeals for expedited consideration as on leave granted.

MACOMB TOWNSHIP v MICHAELS, No. 136923; Court of Appeals No. 286640.

Appeal Dismissed August 1, 2008:

PAPPAS v BORTZ HEALTH CARE FACILITIES, INC, No. 128864; Court of Appeals No. 251144.

GENERAL MOTORS CORPORATION v ROYAL & SUN ALLIANCE USA, INC, No. 134069; Court of Appeals No. 267308.

FEDEWA v ROBERT CLANCY CONTRACTING, INC, Nos. 136065 and 136096; Court of Appeals No. 274088.

Summary Disposition August 7, 2008:

MARKER v MARKER, No. 136721. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Huron Circuit Court, Family Division, for further proceedings. Consistently with MCL 722.31(4), we order that court to make specific findings of fact and conclusions of law on the record regarding the defendant's motion to change the domicile of the minor children. If necessary to make a complete record, the family court may order an investigation be completed by the Friend of the Court and/or may conduct an evidentiary hearing on the matter. In the event that the family court grants the change in domicile, and the change would effectively alter the established custodial environment of the children, the family court shall further require the defendant to prove by clear and convincing evidence that the change would be in the best interests of the children. If such a determination is necessary, the family court shall evaluate the best-interest

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[6] See, e.g., *Jefferson-El v State*, 330 Md 99 (1993), for application of an "appearance of impartiality" standard.

[7] *Adair v Michigan*, 474 Mich 1027, 1043 (2006) (statement of CAVANAGH, J.); *Id.* at 1046 (statement of WEAVER, J.); *Id.* at 1051 (statement of KELLY, J.).

factors in MCL 722.23 and state its findings of fact and conclusions of law on the record. See *Brown v Loveman*, 260 Mich App 576 (2004). In order to expedite resolution of this matter, we direct the family court to conclude its remand proceedings and issue its ruling within 42 days of the date of this order. We do not retain jurisdiction. Court of Appeals No. 281617.

Leave to Appeal Denied August 7, 2008:

CITY OF ECORSE v ECORSE BROWNFIELD REDEVELOPMENT AUTHORITY, No. 136971; Court of Appeals No. 286386.

Leave to Appeal Denied August 8, 2008:

In re MOMANY (DEPARTMENT OF HUMAN SERVICES v SCHULTZ), No. 136978; Court of Appeals No. 283561.

Appeals Dismissed August 8, 2008:

AUTO CLUB GROUP INSURANCE COMPANY v BRALEY, No. 136175. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 279537.

WALLACE v DEPARTMENT OF STATE POLICE, No. 136393; Court of Appeals No. 282897.

Leave to Appeal Denied August 26, 2008:

PEOPLE v PETERSMARCK, No. 137029; Court of Appeals No. 286301.

In re MCBRIDE (DEPARTMENT OF HUMAN SERVICES v MCBRIDE), No. 137064; Court of Appeals No. 282243.

GRIEVANCE ADMINISTRATOR v HAMOOD, No. 137108; ADB No. 05-000026-GA.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal August 28, 2008:

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE, No. 137136. We direct that oral argument be heard on the application on Wednesday, September 3, 2008, at 9:30 a.m. MCR 7.302(G)(1). The motion for recusal is addressed in the joint statement of Justice YOUNG and Justice MARKMAN set forth below. Court of Appeals No. 286734.

CAVANAGH, J. Preliminarily, I note that under MCR 2.003(A) a judge *may*, sua sponte, raise issues regarding his qualification to hear a case.

Taking that opportunity, I note that my participation in this case would be prohibited under MCR 2.003(B)(5) because I have a "more than de minimis interest" in its outcome. However, I will participate because the rule of necessity applies to this unique case, and that rule provides an exception to the disqualification grounds based on due-process concerns and encompassed in MCR 2.003. *See United States v Will,* 449 US 200 (1980).

Secondarily, I do not opine on the disqualification or qualification of any other justice. This is because this Court's traditional disqualification procedure leaves such a determination solely to the challenged justice. I continue to find this procedure wanting on due-process grounds, and I have offered an alternative to the unworkable status quo.* This case is yet another example showing the need to revise our current procedure, whether it be the adoption of my proposal in *Adair v Michigan*, 474 Mich 1027, 1043 (2006), or some other proposal. Nonetheless, bound by our current procedure, I remain mute on the propriety of my fellow justices' participation in this case.

WEAVER, J. Even though I have "more than de minimis interest"+ in the outcome of this case, I decline to recuse myself because the common-law rule of necessity applies in this unique case.

All Michigan judges, active and retired, who under Const 1963, art 6, § 23, are normally eligible for assignment to cases in which a disqualification issue arises, would also be disqualified in this unique case because the outcome of the case affects their "more than de minimis interest[s]" as well. Under these unique circumstances, the common-law rule of necessity requires that I sit in the case because of the duty to provide a forum in which the case may be heard. *United States v Will,* 449 US 200 (1980).

KELLY, J. I acknowledge that, pursuant to MCR 2.003(B)(5), I have an economic interest and other interests that are more than de minimis in the outcome of this matter. Nonetheless, I will participate under the rule of necessity. See *United States v Will*, 449 US 200 (1980).

The decisions of the other justices to participate are solely their own, based on this Court's traditional disqualification procedure. I object to this procedure and again call for the Court to revise it. See *Adair v Michigan*, 474 Mich 1027, 1051 (2006) (statement by KELLY, J.).

YOUNG and MARKMAN, JJ. After having carefully considered the Reform Michigan Government Now! (RMGN) motion to disqualify us, we deny this motion and conclude that we are required to participate for the following reasons:

(1) It is claimed that each of us has a disqualifying interest. Under ordinary circumstances, we would certainly not participate in this case because we do have a direct and disqualifying interest in its outcome. If the proposed initiative is adopted this year, our terms of office will be prematurely ended on December 20 of this year. Such an interest

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* *Adair v Michigan*, 474 Mich 1027, 1043-1044 (2006) (statement by CAVANAGH, J.).

+ MCR 2.003(B)(5).

squarely falls within MCR 2.003(B)(5), which provides in part that a judge is disqualified when he or she "has an economic interest in the subject matter in controversy . . . or has any other more than de minimis interest that could be substantially affected by the proceedings."[1]

(2) RMGN has not asserted, nor do we believe there is any basis for a claim, that we harbor any "actual bias" for or against any party. *Cain v Dep't of Corrections*, 451 Mich 470 (1996). Judges in Michigan are granted "every presumption of fairness and integrity, and heavy indeed is the burden assumed in this Court by the litigant who would impeach the presumption so amply justified through the years." *Mahlen Land Corp v Kurtz*, 355 Mich 340, 351 (1959).

(3) Although the motion to disqualify is directed only at us, the proposed initiative adversely affects the financial interests of *all* judges in this state because, among other things, it would reduce the salary of every judge by 15 percent and decrease his or her retirement benefits. Consequently, each of our colleagues on this Court has an independent ethical obligation to determine whether he or she can participate. See Code of Judicial Conduct, Canon 3(C); MCR 2.003(A).

Thus, the dispositive question in this case is not merely the propriety of our *own* participation, but whether any justice of this Court can participate. For if they are all also precluded from participation by MCR 2.003, there would be no quorum of this Court able to decide this matter. Under such circumstances, pursuant to the "Rule of Necessity," every justice would have a legal obligation to participate in order that judicial review is not precluded altogether.[2]

(4) The "Rule of Necessity" is the ancient common-law principle that

> "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet *he not only may but must do so* if the case cannot be heard otherwise." [*United States v Will*, 449 US 200, 213 (1980), quoting Pollack, A First Book of Jurisprudence 270 (6th ed 1929).][3]

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[1] Although a justice of this Court is not bound by the *procedural* standards set forth in MCR 2.003, *Fieger v Cox*, 480 Mich 874, 875 (2007), the *substantive* standards in this provision are applicable. See *Adair v Michigan*, 474 Mich 1027, 1032-1038 (2006) (statement by TAYLOR, C.J., and MARKMAN, J.). See *id.* at 1051, 1053 (concurrence of CORRIGAN and YOUNG, JJ.).

[2] If a quorum of the Michigan Supreme Court cannot be formed to consider a matter, it has no authority to act. See *Jagger v Coon*, 5 Mich 31 (1858) (there is no authority for the Supreme Court to render judgment when there is no quorum). See also MCL 600.211(3) (a majority of justices shall constitute a quorum for transacting business).

[3] The "Rule of Necessity" is distinct from the "Duty to Sit" doctrine, under which "there is an obligation to remain on any case absent good grounds for recusal," especially in a court of last resort, such as the

In *Evans v Gore*, 253 US 245, 247-248 (1920), the United States Supreme Court held that the members of that court could not decline to decide whether the compensation of federal judges was subject to the power to tax because there was no other appellate tribunal to which the plaintiff judge could go. In *Will*, *supra* at 215-216, a case involving compensation for all federal judges, the Court similarly held that, where all members of the Court would ordinarily have been required to recuse themselves for having a direct interest in the case, none of the members was disqualified because otherwise the case could not have been heard at all. The Court recognized that "[t]he Rule of Necessity has been consistently applied in this country in both state and federal courts." *Id*. at 214. See, e.g., *Bliss v Caille Bros*, 149 Mich 601 (1907).

(5) Among the universe of potential cases or controversies coming before this or any other supreme court, it cannot be that only those pertaining to judges and the judiciary alone are immune from judicial review. The present dispute concerns whether the proposed initiative has complied with the procedures of the Michigan Constitution. As with any other proposed changes in the constitution, such compliance is required and is subject to judicial review. The " 'overarching right of the people' is to have the constitution that they have ratified given respect and accorded its proper meaning." *Michigan United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 393 (2001) (MARKMAN, J., concurring).

(6) The "Rule of Necessity" is properly invoked in this case because, under ordinary circumstances, each of our colleagues would clearly be precluded by MCR 2.003(B)(5) from participation in this case. To our knowledge, none of our colleagues, or even RMGN, has disputed this point. Each of our colleagues is directly interested in this case because, as in *Evans* and *Will*, each has an obvious and substantial economic interest in the subject matter of the controversy. As stated, the five justices who will remain on this Court if the proposed initiative is adopted will incur a 15 percent decrease in annual salary ($24,691) for the remainder of their judicial service. Given the remaining number of years these justices may continue to serve, the overall diminution in salary will range from an estimated $99,000 to $346,000. At a compounded interest rate of four percent, this amount would range from $109,000 to $470,000 during their potential remaining years of service on this Court.[4] In addition, for those justices who participate in the defined-benefit retirement plan, their benefits will be based upon a percentage of their *final* annual salary, i.e., upon the reduced salary implemented by the proposed initiative. For those justices who participate in the defined-contribution retirement plan, their ben-

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supreme court of a jurisdiction, where there are no substitute judges to take the place of those who are recused. *Adair, supra* at 1040-1041 (statement by TAYLOR, C.J., and MARKMAN, J.), citing *Laird v Tatum*, 409 US 824, 837 (1972).

[4] The 30-year bond rate as of August 26, 2008, is 4.41% and the 10-year rate is 3.80%.

efits will reflect a diminished employer contribution based upon the reduced judicial salary. Applying the 2004 Social Security actuarial tables, the overall reduction in retirement benefits among our five colleagues would range from $7,000 to $149,000; taking into consideration a compounded interest rate of four percent for the periods of life expectancy, these amounts would range from $8,000 to $185,000. Thus, the total salary and retirement benefit losses incurred by our colleagues would range from $106,000 to $494,000; with interest considered, these amounts would range from $117,000 to $655,000.[5] To say the least, this constitutes an "economic interest" in the proposed initiative under MCR 2.003(B)(5).[6]

(7) That the "economic interest" of each of the seven justices in the proposed initiative might vary in its particulars is not relevant under the "Rule of Necessity." If a judge has "*an* economic interest," or "more than a de minimis interest," that would be adversely affected, disqualification is triggered under MCR 2.003(B)(5). There is no caselaw that distinguishes between greater or lesser economic interests, and no hierarchy of disqualifying interests. Rather, what is determinative is simply whether a judge under ordinary circumstances would be subject to recusal under MCR 2.003(B)(5); there are either grounds for recusal or there are not. Once again, we are unaware of any justice of this Court who has asserted that he or she would not be subject to recusal in this appeal by virtue of how the proposed initiative would affect his or her financial circumstances if it is approved.[7]

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[5] None of these calculations, of course, take into consideration that some justices may, although not compelled to do so, nonetheless retire from this Court in order to avoid a loss in retirement benefits.

[6] It goes without saying that although neither of us will be receiving a judicial salary if the proposed initiative is ratified, we will also no longer be performing judicial duties in return, and will presumably be receiving compensation in some other position.

[7] We believe that RMGN misapprehends the United States Supreme Court's holding in *Aetna Life Ins Co v Lavoie*, 475 US 813 (1986). In *Aetna*, the Supreme Court held that, although one justice of the Alabama Supreme Court was disqualified, the remaining eight justices were not. *Id.* at 826-827. Thus, *Aetna* has no application here, where plainly all seven justices of this Court *would be* disqualified. It is noteworthy that the Supreme Court additionally engaged in the following hypothetical: "[A]ccepting appellant's expansive contentions might require the disqualification of every judge in the State. If so, it is possible that under a 'rule of necessity' none of the judges or justices would be disqualified." *Id.* at 826, citing *Will*, *supra* at 214. Thus, the Supreme Court suggested that, if the "Rule of Necessity" applied, none of the justices would be disqualified under this rule, including the justice previously determined to be disqualified and who would have had a "greater" interest. Nothing in *Aetna* supports RMGN's proposition that a court applying the "Rule of

(8) The Michigan Supreme Court is this state's highest court and alone is capable of conclusively deciding whether the proposed initiative complies with our constitution. There is clearly no alternative forum to resolve the state constitutional issues being raised in the instant case. There are no procedures for replacing justices of this court who must recuse themselves from a case, and there is no federal jurisdiction in interpreting the constitution of this state.

(9) A due process violation occurs where a person's liberty or property is subjected to " 'the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him.' " *Aetna Life Ins Co v Lavoie*, 475 US 813, 822

Necessity" must take into account variations in judges' economic interests. Rather, it stands for the entirely uncontroversial proposition that, when one judge is disqualified but a sufficient number who are not disqualified can participate, the case should proceed without the participation of the disqualified judge.

In addition, *DuPlantier v United States,* 606 F2d 654 (CA 5, 1979), upon which RMGN also relies, actually supports the proposition that it is improper to distinguish among disqualified judges. In that case, the plaintiffs challenged a requirement that all federal judges file personal financial statements, which failure could result in a penalty up to $5,000. The court applied the "Rule of Necessity" because all federal judges had an interest in the outcome and refused to distinguish between judges who had filed their personal financial statements and those who had not. *Id.* at 662-663.

Finally, *Wheeler v Bd of Trustees of Fargo Consolidated School Dist,* 200 Ga 323 (1946), upon which RMGN also relies, supports the proposition that it is improper to distinguish among disqualified judges. In *Wheeler,* all the justices had a disqualifying interest because the new constitution that was being challenged raised each of their salaries. Relying on the "Rule of Necessity," six of the justices did not disqualify themselves, including one of the justices who asserted a "greater" disqualifying interest as he had been the state's attorney general and had offered "legal opinions concerning the instrument now under attack." *Id.* at 329. Indeed, the court held that the "Rule of Necessity" applied to this justice "with the same force and effect" as it applied to the other justices who were not disqualifying themselves. *Id.* With regard to a seventh justice who *did* disqualify himself, he did so only because the new constitution that was being challenged *created* his very position on the court. Therefore, he only had the authority to sit as a justice if the challenge to the new constitution failed. As the court explained, "Should he participate in this case, his very act in doing so would presuppose the validity of the instrument under attack." *Id.* at 328. In contrast, all of the justices of this Court clearly hold a valid position on this Court.

(1986), quoting *Tumey v Ohio*, 273 US 510, 523 (1927). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 US 133, 136 (1955). However, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Fed Trade Comm v Cement Institute*, 333 US 683, 702 (1948). "The Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Aetna*, *supra* at 828.

The due process requirement against a judge having a "direct, personal, substantial, pecuniary interest" in a case is encompassed in the *more* stringent MCR 2.003(B)(5). Therefore, if a judge is not disqualified under MCR 2.003(B)(5), the constitutional due process requirement has presumably been met. In this case, *each* of the justices is presumptively disqualified under MCR 2.003(B)(5), and, therefore, RMGN's due process rights arguably cannot be protected. However, to altogether deprive a party, as in this case, of *any* tribunal to hear a case or controversy is an even *greater* denial of due process.[8] As the United States Court of Claims has stated:

> We regret that it falls our lot to decide these cases, and we would much prefer that a resolution of the controversy not be our responsibility. Nevertheless, we realize that the plaintiffs are entitled to have their cases heard and decided by a court of the United States, and under the law there is no other court to which they could go. Should we refuse to hear and decide their cases, the doors of the courts would be closed to them. This could amount to a denial of due process under the 14th amendment to the Constitution. [*Atkins v United States*, 214 Ct Cl 186, 207 (1977).]

Accordingly, the requirements of due process must normally yield to the "Rule of Necessity"—a doctrine itself predicated on due process requirements—and the members of this Court must decide this case. That is, because all of the justices on this Court have an economic interest in the outcome of this case, all are disqualified; however, because this would deprive the parties of a forum in which to litigate, none of the justices can be disqualified.

(10) For these reasons, we are not only exempted from recusal in this case, but we are *obligated* to participate. *Will*, *supra* at 213. Therefore, we deny the motion to disqualify.

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[8] As RMGN itself recognizes, "[t]he rule of necessity is a[n] . . . exception to the Due Process requirement of an impartial decision maker" as it is only applicable where it is necessary to "satisfy a litigant's Due Process right to have his case heard." Brief of RMGN at 9. Indeed, the "Rule of Necessity" necessarily must constitute an exception to ordinary guarantees of due process because, by definition, it expressly allows judges who would ordinarily be viewed as "interested" to hear a case.

Summary Dispositions September 4, 2008:

MARTIN v SECRETARY OF STATE, No. 137173. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and the Ingham Circuit Court for the reasons stated in the Court of Appeals dissenting opinion, but only as to the issues of candidate standing and the trial court's application of equity. A candidate for elective office suffers a cognizable injury in fact if, due to the improper interpretation and enforcement of election law, he or she is prevented from being placed on the ballot or must compete against someone improperly placed on the ballot. We reinstate the decision of the Secretary of State to remove plaintiff Christopher P. Martin's name from the ballot. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Reported below: 280 Mich App 417.

YOUNG, J. (*concurring*). I concur in the decision to reverse but write to express my own dismay at the tone and conclusion reached by Justice KELLY. She condemns as "manifestly unjust" the result reached by the majority. She does so based entirely on her understandable sympathy with the plaintiff, who was obviously misled by the Secretary of State's office. Justice KELLY does not explain how the Secretary of State has the power to alter the unambiguous statutory deadline, nor does she address the authority of the courts to revise such a statute.[1]

Contrary to her position today, not long ago, Justice KELLY, writing for the Court in *Stokes v Millen Roofing Co*,[2] held:

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[1] Justice KELLY offers a disingenuous interpretation of MCL 168.413 in order to justify ignoring that the Legislature created candidate nominating petition deadlines. She suggests that MCL 168.413 confers discretionary authority on the Secretary of State to accept nominating petitions after 4:00 p.m. on the fourteenth Tuesday preceding the primary. This is erroneous and plainly contradicted by the statutory text. The statute unambiguously sets a deadline. Indeed, to read it as she suggests puts it in conflict with MCL 168.415, which *does* provide an extension to what it calls "the *deadline* for filing nominating petitions under section 413" when the death or other disqualification of a judicial candidate causes there to be fewer candidates than positions. MCL 168.415(2) (emphasis added).

Although Justice KELLY is right that this case presents an "extreme circumstance," there is no statutory authority to extend the unambiguous deadline beyond which the Secretary of State cannot accept petitions.

[2] *Stokes v Millen Roofing Co*, 466 Mich 660, 671-672 (2002) (citations omitted).

> In its bench ruling granting equitable relief to Millen, the trial court stated that a court in equity may provide for nonlegal, equitable remedies to avoid unduly harsh legal doctrines. Its analysis is invalid because, in this case, equity is invoked to avoid application of a statute. Courts must be careful not to usurp the [l]egislative role under the guise of equity because a statutory penalty is expressly punitive. As the Court of Appeals stated:
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> "*Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.*"

I agree with Justice KELLY's statement of legal principles in *Stokes*. Now, in *this* case, it appears that Justice KELLY has abandoned her *Stokes* opinion and the very principles she propounded there.

It appears that Justice KELLY's adherence to precedent is "flexible," such that she is willing to ignore *even her own decisions* when she finds them inconvenient. I am, as is the majority, prepared to follow *Stokes*—even if its author abandons it.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ. We join the statement of Justice YOUNG.

MARKMAN, J. (*concurring*). With all respect to Justice KELLY, it is not "manifestly unjust" for this Court to conclude that the plain words of a law enacted by the Legislature cannot be modified by a clerk in the Secretary of State's office (or indeed by the Secretary of State herself). In this case, the law requires that a candidate seeking to run for a judgeship in the 23rd Judicial Circuit obtain 200 to 400 petition signatures. MCL 168.544f.[1] By the filing deadline, plaintiff, acting upon the guidance of the Secretary of State's office, had obtained only 158 signatures. Although it is unfortunate that plaintiff received incorrect guidance, such guidance cannot alter the law of this state. Thus, the trial court erred in affording plaintiff an opportunity beyond the filing deadline to obtain additional signatures. There cannot be as many laws as there are public servants who dispense guidance or advice on the meaning of the law. Rather, such guidance or advice must always be understood as subordinate to the law actually enacted by the elected representatives of the people.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the order in that the proposed intervenors do have standing; therefore, I would vacate the Court of Appeals judgment and reverse the trial court in that respect.

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[1] Contrary to Justice KELLY, I do not believe that the statute fails to notify candidates of its signature requirements because it requires a candidate to apprise himself of the population of the district he intends to serve.

However, I disagree with the adoption of the Court of Appeals dissent regarding the remedy plaintiff deserved.[*] Instead, I would affirm the remedy granted by the trial court—an injunction mandating that plaintiff be given additional time to present the requisite valid signatures and be put on the ballot if he presents them. This is because the state defendants repeatedly informed plaintiff of the incorrect number of signatures required, while concomitantly warning plaintiff that it was unlawful to file more than the correct number. Therefore, the trial court granted the appropriate equitable relief.

It would simply be unfair to punish plaintiff for an error that he did not commit and with which he was forced to comply.

WEAVER, J. I join the statement of Justice CAVANAGH.

KELLY, J. (*dissenting*). I believe that the result reached by the majority of the Court in this case is manifestly unjust. The name of plaintiff-appellee, Christopher Martin, will not appear on the ballot in the November election for judge of the circuit court for Alcona, Arenac, Iosco, and Oscoda counties. The reason is that Martin submitted too few signatures to qualify as a candidate.

The undisputed reason Martin submitted too few signatures is that, before the due date, the Secretary of State mistakenly informed him, both verbally and in writing, about the number needed. The Secretary of State informed Martin that he needed to submit 100 to 200 petition signatures. More would subject him to a misdemeanor penalty. But after he had submitted 158 signatures and the deadline had expired, Martin learned that 200 to 400 signatures were needed. He immediately attempted to submit 208 additional signatures. The Secretary of State rejected the submission and removed Martin's name from the ballot.

Martin brought a suit seeking equitable relief. The circuit court granted his request, ordering the Secretary of State to extend the filing deadline and, if the additional signatures were found to be valid, to place Martin's name on the ballot. The Court of Appeals affirmed the decision.[1] But this Court has reversed the lower courts' result and removed Martin from the ballot. It does so because it refuses to allow equity to be applied in this election-law case for fear of creating a dangerous precedent.

For years, candidates for office in this state have relied on the advice of the Secretary of State, particularly the director of elections, when attempting to decipher obtuse statutes. That is what Martin did here. But, as a result of today's unnecessarily rigid decision, Martin will be removed from the ballot. Moreover, future candidates will hesitate to rely on the interpretative advice of the Secretary of State in such matters.

I believe that equity should have been applied here to uphold the result reached by the lower courts. Martin has been wronged by a mistake on the part of the Secretary of State. Our appellate opinion could and should right that wrong. If narrowly drawn, it could avoid a

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[*] Although this action includes several plaintiffs, I refer singularly to plaintiff Christopher P. Martin because he is the judicial candidate whose name will, or will not, be on the ballot as a result of this case.

[1] *Martin v Secretary of State*, 280 Mich App 417 (2008).

dangerous precedent, all the while treating Martin justly and continuing state assistance to candidates for office at the current level.

Justice YOUNG claims that I ignore and abandon my decision in *Stokes v Millen Roofing Co*.[2] This claim is both misleading and incorrect. In *Stokes,* I wrote to overrule a Court of Appeals decision that allowed an unlicensed contractor to use equity as leverage to force payment from a homeowner. I reasoned that, if the Court of Appeals opinion had been allowed to stand,

> any unlicensed contractor could defy the residential builders act and the Construction Lien Act by refusing to obtain a Michigan residential builder's license. It could contract with a residential home owner to perform work on the owner's home. Then, if a dispute arose over money due, it could cloud the title with a lien and wait until the owner brought suit to clear title. It could then recover the amount due in an equity judgment.[3]

Hence, *Stokes* involved the misuse of equity by a contractor to defy the licensing statute. That is quite a different matter than the use of equity by the courts to properly apply a statute and protect a person from the harm caused by a government agency's blunder.

No statute prohibits a court from requiring the Secretary of State to accept the additional signatures, as the trial court required in this case. MCL 168.413 mandates that the Secretary of State, who is charged with the oversight of elections, receive nominating petitions up to 4:00 p.m. of the fourteenth Tuesday preceding the primary. Without question, then, the Secretary of State *must* receive nominating petitions up to that time. However, the Secretary of State *may* accept nominating petitions *after* 4:00 p.m. on the relevant date. That is exactly what the trial court ordered it to do as a consequence of its mistake.

In interpreting a statute, courts presume that the Legislature enacted it having in mind previously enacted statutes relating to the same subject matter.[4] Accordingly, all such statutes should be construed together to produce a harmonious result.[5] Applying this maxim here, although MCL 168.544f required 200 to 400 signatures once the counties' population was determined, MCL 168.413 allowed the Secretary of State to accept nominating petitions after the deadline for filing signatures. Therefore, the trial court's equitable remedy that ordered the Secretary of State to accept the additional signatures was within the bounds of MCL 168.544f and MCL 168.413 read together.

This case presents an extreme circumstance. Martin reasonably relied on, and placed confidence to his detriment in, the Secretary of State's

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[2] *Stokes v Miller Roofing Co*, 466 Mich 660 (2002).

[3] *Id*. at 672-673.

[4] *Palmer v State Land Office Bd*, 304 Mich 628, 636-637 (1943).

[5] *Rathbun v Michigan*, 284 Mich 521, 544 (1938).

advice.[6] If the majority of this Court believes that equity is not applicable here, I question when it would apply equity at all.

The decision of the Court of Appeals should be affirmed.

Leave to Appeal Denied September 4, 2008:

MAYOR OF DETROIT v GOVERNOR, No. 137197; Court of Appeals No. 287462.

Leave to Appeal Denied September 8, 2008:

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE, No. 137136. We affirm the result only of the August 20, 2008, judgment of the Court of Appeals. MCR 7.302(G)(1). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Reported below: 280 Mich App 273.

TAYLOR, C.J., and CORRIGAN, J. (*concurring*). We concur with the Court of Appeals judges and other justices of this Court that the doctrine of necessity applies and that, pursuant to it, we are required to participate in this case.

CAVANAGH, WEAVER, and MARKMAN, JJ. (*concurring*). We concur in this Court's order affirming only the result reached in the August 20, 2008, judgment of the Court of Appeals for the following reason. Const 1963, art 12, § 2, provides with regard to constitutional amendments proposed under this section that "[t]he ballot to be used in such election shall contain a [true and impartial] statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption." This language establishes a clear limitation on the scope of constitutional amendments under § 2. Specifically, this statement of purpose must consist of a "true and impartial" statement that sufficiently, fairly, reasonably and understandably communicates to the people of this state the purpose of the amendment in "not more than 100 words." Such an interpretation of this provision is in accordance with the " 'common understanding' " of the " 'great mass of the people.' " *Traverse City School Dist v Attorney General*, 384 Mich 390, 405 (1971), quoting Cooley's Constitutional Limitations 81 (1868).[1] The instant proposal

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[6] It is not correct, as Justice MARKMAN infers, that MCL 168.544f would have notified Martin how many signatures he needed. To determine the correct number, Martin would have had to determine the total population of the combined counties in the 23rd Judicial Circuit. In effect, he relied on the Secretary of State for that information.

[1] "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from

would alter or affect some 19,000 words of the Michigan Constitution, and would alter or affect some 28 sections of this constitution, including four separate articles, thus affecting each of the branches of state government. Because of the exigencies of the present election schedule, and because a proposal of this extraordinary scope and multitude of unrelated provisions clearly cannot be reasonably communicated to the people in "not more than 100 words," we agree with the Court of Appeals that this proposal cannot be placed on the ballot without violating our constitution.[2]

WEAVER, J. (*concurring*). I agree with this Court's order finding that the Reform Michigan Government Now! proposed amendment is not qualified to be placed on the November 4, 2008, ballot for the reasons stated in my joint concurring statement with Justices CAVANAGH and MARKMAN. That statement is a restrained and disciplined interpretation of our Michigan Constitution. The statement applies the longstanding Michigan law, so wisely and well stated by Justice COOLEY in Constitutional Limitations 81 (1868) and quoted in *Traverse City School Dist v Attorney Gen*, 384 Mich 390, 405 (1971), that our constitution is interpreted in light of the common understanding of the ratifiers—the people of Michigan.

Common sense shows that the drafters and ratifiers of our Michigan Constitution required a purpose statement of "not more than 100 words" to be printed on the ballot so that voters would have sufficient, understandable, impartial, and true information on the ballot. This allows the voters to make an informed decision on the proposed constitutional amendment by reading the "not more than 100 words" purpose statement printed right on the ballot, without having to read the amendment itself and/or the proposal petition itself, which would likely contain many more than 100 words.

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the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." *Traverse City School Dist*, *supra* at 405, quoting Cooley's Constitutional Limitations, *supra* at 81 (emphasis and quotation marks omitted).

[2] While Justice KELLY is correct that, under normal circumstances, this case should have been remanded to the Board of State Canvassers, having now heard oral arguments, and given the certainty that any decision of the board would have been immediately appealed back to this Court, we believe that it would be futile to remand at this late juncture. Whether the effective deadline for a ballot decision is this past Friday, as asserted by the director of elections, or some later date, it is clear that an urgent decision from this Court is required under emergency circumstances.

The Court of Appeals order finding that the RMGN proposed amendment is not qualified to be placed on the ballot reached the correct result, but for the wrong reasons. The Court of Appeals wrongly prohibited the Board of State Canvassers from doing its duty to decide whether or not to place the RMGN proposal on the November 4, 2008, ballot. The board was scheduled to make that decision the day after the Court of Appeals order was issued.

The Court of Appeals opinion failed to consider and apply the "not more than 100 words" purpose statement requirement for qualification to be placed on the ballot for voter-initiated amendments by petition to our Michigan Constitution found right in § 2 of art 12. Instead, the Court of Appeals reached out to rules created by the California Supreme Court and wrote into our Michigan Constitution words, phrases, and concepts such as: "qualitative," "quantitative," "two-prong test," "threshold determination," "foundation powers," all of which are not anywhere contained in Michigan's Constitution. Further, the Court of Appeals, in a kind of circular analysis—in reliance on California Supreme Court law, and then supported by California Supreme Court law—wrongly incorporated by interpretation into the Michigan Constitution these words, phrases, and concepts.

The Court of Appeals opinion is an example of judicial activism—of the unrestrained, mistaken use of the power of interpretation. Such California law interpreted directly into our Michigan Constitution, or circularly relied on for support, seems harmless in this case because it reaches the correct result, but it is harmful and dangerous for the future. It wrongly creates a "judicial veto" over future voter-initiated proposed amendments by petition even if such a proposed amendment were a one (1)-issue, single-purpose amendment whose "not more than 100 words" purpose statement for printing on the ballot would easily be sufficient, understandable, impartial, and true.

For example, *Raven v Deukmejian*, 52 Cal 3d 336 (1990), cited by the Court of Appeals, and approvingly cited by amicus Michigan Attorney General, is an example of a one (1)-issue, single-purpose, simply stated amendment proposal judicially vetoed from placement on the ballot by the California Supreme Court using the "foundation powers" concept.

Further, I note that Justice CORRIGAN's concurring statement, signed by Chief Justice TAYLOR and Justice YOUNG, does not challenge the Court of Appeals opinion's distinction between "amendment" and "general revision." And it only questions the Court of Appeals direct interpretation into Michigan's Constitution judicially created California Supreme Court constitutional law, despite the fact that California's law results in a "judicial veto" of the people of Michigan's right to voter-initiated amendment of the Michigan Constitution by giving definitions to the words "amendment" and "revision" not contained in our Michigan Constitution.

Finally, as to the issue of disqualification of justices, I concur in this Court's denial of leave to appeal from the Court of Appeals August 13, 2008, order denying the motion for recusal (disqualification).[1]

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[1] On August 13, 2008, the Court of Appeals denied intervening defendant Reform Michigan Government Now!'s motion for recusal (disquali-

As I stated in my recusal statement attached to the August 28, 2008, order granting the application for leave to appeal in this case, "[e]ven though I have 'more than de minimis interest' [MCR 2.003(B)(5)] in the outcome of this case, I decline to recuse myself because the common-law rule of necessity doctrine applies in this unique case."

Five of the seven justices of this Court, before participating in decisions and oral argument in this case, properly filed statements regarding their "more than de minimis interest[s]" in this unique case in accordance with Canon 3 of the Code of Judicial Conduct.[2] Only Chief Justice TAYLOR and Justice CORRIGAN failed to state their obvious "more than de minimis interest[s]" in this case. Although today, September 8, 2008, Chief Justice TAYLOR and Justice CORRIGAN filed a joint statement concurring with the other justices that the doctrine of necessity required that they participate, neither Chief Justice TAYLOR nor Justice CORRIGAN disclosed that they have "more than de minimis interest[s]" in this case. Thus, I agree with and support Justice CAVANAGH's statement of August 28, 2008, in this case that this Court needs written, clear rules regarding the disqualification of justices.

This 2008 RMGN case again highlights the need for this Court to have written, clear rules regarding the disqualification of justices. Since May 2003, I have repeatedly called for this Court to recognize; publish for public comment, place on a public hearing agenda, and address the need to have written, clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. See, e.g., statement or opinion by WEAVER, J., in *In re JK*, 468 Mich 202, 219 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit*, 474 Mich 999, 1000 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Adair v Michigan*, 474 Mich 1027, 1044 (2006); *Grievance Administrator v Fieger*, 476 Mich 231, 328 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228, 1231 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections*, 477 Mich 1049 (2007); *State Auto Mutual Ins v Fieger*, 477 Mich 1068, 1070 (2007); *Ansari v Gold*, 477 Mich 1076, 1077 (2007); *Short v Antonini*, 729 NW2d 218 (2007);

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fication). Subsequently, RMGN filed an appeal with this Court on the recusal issue, along with its appeal on the merits.

[2] Canon 3 in pertinent part is set forth below:

> **CANON 3. A Judge Should Perform the Duties of Office Impartially and Diligently**
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> * * *
>
> **C. Disqualification.** A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).

Flemister v Traveling Med Svcs, *PC*, 729 NW2d 222, 223 (2007); *McDowell v Detroit*, 477 Mich 1079, 1084 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); *Tate v Dearborn*, 477 Mich 1101, 1102 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007); *Cooper v Auto Club Ins Ass'n,* 739 NW2d 631 (2007).

Also see my personally funded website—http://www.justiceweaver.com.

CORRIGAN, J. (*concurring*). I join the Court's order affirming the result of the Court of Appeals judgment. On the basis of my review, which was limited by time constraints, I do not see a clear error in the Court of Appeals articulation of the distinction between an "amendment" and a "general revision" of the Michigan Constitution, its explanation of the separate methods for enacting each, or its conclusion that the proposal here is a "general revision." Although I respectfully question the importation of caselaw from California and other foreign jurisdictions, I believe that the Michigan authorities cited in the Court of Appeals opinion fully support its rationale and decision.

TAYLOR, C.J., and YOUNG, J. We join the statement of Justice CORRIGAN.

KELLY, J. (*dissenting*). I would not affirm the Court of Appeals decision. Instead, after oral argument and deliberation on September 3, I would have granted leave to appeal and, retaining jurisdiction, would have remanded the matter to the Board of State Canvassers.

Within the statutory time constraints,[1] the Court should have instructed the Board of State Canvassers to submit to the Court its proposed 100-word statement of purpose for the ballot initiative. The Court should then have reviewed the proposal to determine whether it provided a true and impartial statement of the purpose of the initiative. If the language were adequate, it should have put the initiative on the ballot. If inadequate, it should have ordered the initiative off the ballot.

I agree with the statement of Justices CAVANAGH, WEAVER, and MARKMAN that our state constitution at article 12, section 2, "establishes a clear, albeit indirect, limitation on the scope" of constitutional ballot initiatives. I believe that the limitation is in the requirement that the initiative be capable of

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[1] The parties offered differing timetables for when this litigation must be resolved to allow for timely printing and delivery of the November ballots. One argued that the Court must take final action by September 16, the deadline for the Secretary of State to certify the ballot. Another submitted an affidavit of Christopher Thomas, director of elections for the state of Michigan, stating that, from a practical standpoint, all proposal language must be certified to the county clerks no later than September 5. The affidavit stated that the September 5 deadline was necessary to ensure timely printing of the ballots. But it also noted that the Michigan Democratic Party's convention on September 6 would delay full certification of the ballot until September 8. The Court of Appeals rendered its decision on August 20. An appeal was filed in this Court on August 22. Regardless of which deadline one accepts, ample time existed for this Court to receive input from the Board of State Canvassers and render a decision after completing oral argument on September 3.

being communicated to the voters in not more than 100 words. I agree, also, that any such statement of purpose must be easily understandable.

But, without having the Board of State Canvassers' proposed language before it, how can this Court determine that a legally acceptable statement of purpose cannot possibly be made in 100 words? It does not follow "as the night the day"[2] from the fact that the initiative is lengthy and complex that it cannot be summarized adequately in 100 words. I find that Justices CAVANAGH, WEAVER, and MARKMAN prejudge this question, and at this point I am not prepared to conclude that a legally adequate summary is impossible.

Also, I respectfully disagree with Justice CORRIGAN's assertion that "the Michigan authorities cited in the Court of Appeals opinion fully support its rationale and decision." The Court of Appeals concluded that the Reform Michigan Government Now! (RMGN) petition "plainly" constitutes a "general revision" of the state constitution and therefore does not meet the constitutional prerequisites for a ballot initiative.[3] Having considered the text of the constitutional provisions at issue and the limited authority available, I cannot agree.

THE ESSENTIAL 100-WORD STATEMENT OF PURPOSE

The following is the statement of purpose proposed for the initiative but, because of the courts' intervention, not yet acted on by the Board of State Canvassers:

> **A proposal to amend the state constitution to alter the legislative, executive and judicial branches of state government.**
>
> The proposed constitutional amendment would:
>
> • Require no-reason absentee voting.
>
> • Limit election officials' support of candidates.
>
> • Create separate Office of Elections to supervise elections.
>
> • Create direct initiation of laws by petition.
>
> • Reduce number of Senate and House districts.
>
> • Establish bipartisan commission and standards for creating legislative districts; prohibit state court review of districts.
>
> • Prohibit former elected officials from lobbying for 2 years.
>
> • Reduce salaries, limit retirement benefits and disclose personal finances of legislative, executive and judicial officials.
>
> • Disclose Legislature's financial records.

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[2] William Shakespeare, *Hamlet*, act 1, scene 3.

[3] See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 307, and accompanying order, 280 Mich App 801 (2008); Const 1963, art 12, §§ 2 and 3.

• Limit state departments to 18; cap boards/commissions.

• Reduce size of Supreme Court and Appeals Court; add circuit judges.

• Transfer discipline of judges to new commission.

Should this proposal be adopted?

It is true that certain details of the ballot initiative do not appear in the proposed statement of purpose. But, it is the publicly stated position of the director of elections that article 12, § 2 of the Michigan Constitution does not require that the statement of purpose include every change the initiative would effectuate.[4] The Court should make a definitive ruling on this question.

THE AMENDMENT/REVISION DISTINCTION

In differentiating between an amendment and a revision, the Court of Appeals rendered several conclusions that are at best weakly supported and lack the comprehensive analysis this case requires. For example, the Court determined that it is "not possible to 'define with nicety the line of demarcation' between an 'amendment' and a 'general revision.' "[5] But the panel then determined that it is unnecessary to attempt to draw such a line, because the RMGN petition would, in any event, clearly cross it and constitute a revision. As noted previously, little Michigan caselaw exists on the distinction between a constitutional amendment and a constitutional revision. The Court of Appeals seems to be saying that, although no clear definition is available, it knows a revision when it sees it. I find this reasoning unconvincing.

The distinction between an amendment and a revision that was acceptable to the Court of Appeals was that urged by the plaintiffs. But the plaintiffs cited no constitutional language supporting the distinction. They relied on *Kelly v Laing*,[6] a case that involved interpretation not of a

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[4] <http://www.southbendtribune.com/apps/pbcs.dll/article?AID=/20080904/News01/809040446/1052/News01> (accessed September 5, 2008) ("[E]lections director Chris Thomas told reporters he agreed with Reform Michigan Government Now's stance on the 100-word limit . . . . He said there's a difference between describing every part of a measure and telling voters its purpose. 'I can show you lots of proposals where substantial things didn't get included,' Thomas said of past ballot issues.")

[5] *Citizens Protecting Michigan's Constitution*, *supra* at 303-304, quoting *McFadden v Jordan*, 32 Cal 2d 330, 348 (1948).

[6] *Kelly v Laing*, 259 Mich 212 (1932). Nowhere in the language of the Michigan Constitution is "amendment" or "revision" defined. Two sections address amendments and revisions, but they lay out only the procedural formalities necessary for a proposal to be ballot-eligible. They

constitution but of a city charter. As RMGN argued before this Court, the use of *Kelly* to make the distinction between a constitutional amendment and a constitutional revision is dubious. The authority cited in *Kelly* in support of its amendment/revision distinction is marginal at best.[7]

STATE PUBLIC POLICY STRONGLY SUPPORTS SUBMITTING BALLOT INITIATIVES TO THE VOTERS

When analyzing this case, the Court's public policy must not be overlooked. It has long been recognized that the citizens' right to decide whether to amend the state constitution must be zealously protected.[8]

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do not expressly or impliedly provide criteria for distinguishing between an "amendment" and a "revision." To support its distinction, the Court of Appeals relied heavily on *Kelly*. That opinion rejected the dictionary definitions of "revision" and "amendment," stating that the words "implie[d]" and "suggest[ed]" different meanings. *Id*. at 217-218. The current majority of this Court has explicitly rejected such reasoning many times. In *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 67-68 (2008), it stated: "This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification." This majority routinely consults dictionaries to ascertain the plain meaning of a term. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 18 (2002). The dictionary definitions of "amend" and "revise" do not support the Court of Appeals decision in this case.

[7] The language from *Kelly* most relied on by plaintiffs to distinguish an "amendment" from a "revision" cites *Livermore v Waite*, 102 Cal 113 (1894), and *a dissenting opinion* from *People v Stimer*, 248 Mich 272, 287 (1929). *Kelly*, *supra* at 217-218. Hence, *Kelly* relied on foreign law and a Michigan Supreme Court dissent. Having nothing other than *Kelly*, the Court of Appeals also relied on *McFadden*, *supra*, more foreign law. *McFadden* based its amendment/revision distinction primarily on the California case of *Livermore*, *supra*. I agree with Justice CORRIGAN's questioning of the importation of California law to define the Michigan Constitution. *Kelly's reliance on Livermore reduces its persuasiveness, in my mind. Finally, it is hardly worth mentioning that the Stimer dissent is not binding authority. Therefore, the Kelly Court's reliance on that dissent only further undermines the value of its conclusions regarding the amendment/revision distinction.*

[8] "This Court has a tradition of jealously guarding against . . . encroachments on the people's right to propose laws and constitutional amendments through the petition process." *Ferency v Secretary of State*, 409 Mich 569, 601 (1980), citing *Wolverine Golf Club v Secretary of State*, 384 Mich 461 (1971).

One hundred years ago, Michigan adopted the direct citizen initiative in the Michigan Constitution of 1908. Initially, it allowed the Legislature to veto any citizen-initiated proposal to amend the constitution. However, only five years after its adoption, the constitution was amended, eliminating the Legislature's power to override the will of the citizenry to amend the constitution.

Cases decided by this Court since then have consistently rejected limitations on citizen-initiated amendments, especially *before* the people have an opportunity to vote on them.[9] This Court has also specifically noted the absence of a single-subject limitation for a proposed constitutional amendment, such as the one adopted in California.[10]

It is therefore well settled in Michigan law that our public policy recognizes the importance of allowing voters whenever possible to use the ballot box to decide issues.[11] This policy has been enshrined in the Michigan Constitution for a century.[12] And, when assessing the validity of ballot measures, this Court has consistently held that important public policy in high esteem.[13]

Hence, the Court should proceed with great caution when deciding to withhold the decision on this ballot initiative from the people of the state. To do so without allowing the Board of State Canvassers to adopt a statement of purpose does not reflect such caution and is, in my opinion, a rush to judgment.

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[9] *Ferency*, *supra* at 601-602; *City of Jackson v Comm'r of Revenue*, 316 Mich 694 (1947); *Hamilton v Secretary of State*, 212 Mich 31 (1920).

[10] *Graham v Miller*, 348 Mich 684, 692 (1957). Appellees argued in the alternative before the Court of Appeals that this initiative violates the Michigan Constitution because the constitution allows only amendments that embrace a single purpose.

[11] See *Blank v Dep't of Corrections*, 462 Mich 103, 150 (2000) (MARKMAN J., concurring) ("Indeed, there is no more constitutionally significant event than when the wielders of '[a]ll political power' under [the Michigan Constitution] choose to exercise their extraordinary authority to directly approve or disapprove of an amendment thereto."); *Grand Rapids City Clerk v Superior Court Judge*, 366 Mich 335, 340 (1962) (reversing temporary injunction enjoining annexation election because "[t]he people are more closely involved with their government in elections than in almost any other process. Interference by the courts . . . should be avoided. Those complaining of the election have a clear and adequate remedy by quo warranto to test the constitutional issue in the event of a favorable vote.").

[12] See Const 1963, art 2, § 9; Const 1908, art 5, § 1 (reserving the powers of initiative and referendum to the people of Michigan).

[13] "[W]e are not unmindful of the fact that to now declare the amendment a nullity would thwart the expressed will of the voters." *City of Jackson*, *supra* at 711.

THE UNFORTUNATE RAMIFICATIONS OF TODAY'S ORDER

I also note that, by affirming only the result reached by the Court of Appeals, the majority leaves the law in this area sadly unsettled. Rather than articulate its own analysis of the issues, the majority elects simply to summarily keep the initiative off the ballot while rejecting the reasoning of the Court of Appeals. What guidance has this Court offered to individuals and organizations that wish to sponsor ballot initiatives in the future? How are they to know how many constitutional changes in one initiative are too many, or how sweeping is too sweeping?

The Reform Michigan Government Now! petition contains approximately 19,000 words and makes changes or additions to 28 different sections of the constitution. Some of my colleagues indicate, without support carrying precedential force, that this initiative is unconstitutional because it is too extensive. Would an initiative with 18,000 words pass constitutional muster? Would one making changes to 27 sections of the constitution be excessive?

Some of my colleagues opine, without explanation, that it would be impossible to provide a true and impartial statement of this ballot initiative in 100 words. To what extent, then, must statements of purpose for future initiatives be more detailed than those in the past? Does rendering it more difficult to get a ballot proposal approved by the Elections Division and the Board of State Canvassers not contradict our public policy?

The Court fails to provide standards that would answer these essential questions. I submit that we have neglected our duty to the citizens of Michigan to serve as the final arbiter of the law. And in few instances is that duty more important than in this case.

Reconsideration Denied September 8, 2008:

MARTIN v SECRETARY OF STATE, No. 137173. The motion for immediate consideration is granted. The motion for reconsideration of this Court's September 4, 2008, order is considered, and it is denied, because it does not appear that the order was entered erroneously. While under ordinary circumstances, this Court might have ordered the trial court to allow the proposed intervenor-appellant to intervene and then remanded for further proceedings, after which the intervenor-appellant would have been able to appeal an adverse trial court ruling on the merits, under the instant emergency circumstances, we believe that it was necessary to address both of these matters in the same order. Summary disposition entered at 482 Mich 956. Reported below: 280 Mich App 417.

CAVANAGH and WEAVER, JJ. We would grant reconsideration for the reasons set forth in Justice CAVANAGH's September 4, 2008, concurring and dissenting statement in this case.

KELLY, J. I would grant reconsideration for the reasons set forth in my September 4, 2008, dissenting statement in this case.

Summary Dispositions September 9, 2008:

INNES v ALLIED AUTOMOTIVE GROUP, INC, No. 134319. By order of January 30, 2008, the application for leave to appeal the May 24, 2007, order of the Court of Appeals was held in abeyance pending the decision in *Stokes v Chrysler LLC* (Docket No. 132648). On order of the Court, the case having been decided on June 12, 2008, 481 Mich 266 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Board of Magistrates for a new hearing and decision consistent with this Court's decision in *Stokes*. The plaintiff's current entitlement to benefits shall continue until a new decision is issued by the Board. Court of Appeals No. 276633.

WEAVER, J. I would grant leave to appeal.

PEOPLE v EARL DIXON, No. 135919. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for expedited consideration as on leave granted in light of *People v Muttscheler*, 481 Mich 372 (2008). Court of Appeals No. 282134.

PEOPLE v MUHN, No. 136577. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. On remand, while retaining jurisdiction, the Court of Appeals shall remand the case to the Macomb Circuit Court for appointment of counsel for the defendant, if determined to be indigent, and for the circuit court to prepare a certified concise statement of proceedings arising from the March 6, 2007, sentencing hearing and all postjudgment proceedings. Once the circuit court has prepared a proposed concise statement of proceedings, it shall serve copies on all parties along with a notice of hearing with the date, time, and place for settlement of the concise statement. Thereafter, the circuit court shall proceed in accordance with MCR 7.205(G)(2), (3), and (4). Upon return to the Court of Appeals, that court shall consider the certified concise statement of proceedings, and any further briefing by the parties, and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2).

The motion to add issue and motion to remand for an evidentiary hearing regarding the claim of ineffective assistance of counsel are denied. We do not retain jurisdiction. Court of Appeals No. 284173.

PEOPLE v BINSCHUS, No. 136600. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 283799.

WEAVER, J. I would deny leave to appeal.

Leave to Appeal Denied September 9, 2008:

PEOPLE v MADDOX, No. 135542; Court of Appeals No. 278045.

PEOPLE v MADDOX, No. 135707. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282785.

PEOPLE v KYLE, No. 135842. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279206.

PEOPLE v WITBRODT, No. 135896. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279144.

PEOPLE v RAYMOND GRAY, No. 135901. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282552.

PEOPLE v DARNELL ANDERSON, No. 135905. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for a new trial and an evidentiary hearing is denied. Court of Appeals No. 279278.

PEOPLE v LEO GLOVER, No. 135915. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281975.

PEOPLE v HOLLINGSWORTH, No. 135930. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279209.

PEOPLE v BATEY, No. 135931. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280958.

PEOPLE v BURGESS, No. 135960. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279002.

PEOPLE v ANTON, No. 135969. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280064.

PEOPLE v TAYLOR, No. 135972. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278028.

PEOPLE v MICHAEL WILSON, No. 135975. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278937.

PEOPLE v MAURO, No. 135978. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278853.

PEOPLE v TERVARES WILLIAMS, No. 135982. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 281058.

PEOPLE v REGINALD BROWN, No. 135987. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280337.

PEOPLE v CUSTER, No. 135990; Court of Appeals No. 282796.

PEOPLE v GOODSON, No. 135993. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282378.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Scott*, 480 Mich 1019 (2008).

PEOPLE v RODEN, No. 136000. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282992.

PEOPLE v MAURICE WILLIAMS, No. 136002. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281312.

PEOPLE v ANNABEL, No. 136011. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279358.

PEOPLE v OWENS, No. 136013. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for miscellaneous relief is granted. Court of Appeals No. 279169.

PEOPLE v SCOTT DAVIS, No. 136025. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281255.

PEOPLE v KORAS, No. 136026. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to amend the defendant's pleading is granted. Court of Appeals No. 282578.

PEOPLE v FRANK PARKER, No. 136031. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281702.

PEOPLE v WAYNE MOORE, No. 136032. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 281405.

PEOPLE v DORTCH, No. 136042. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282660.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v CRATER, No. 136055; Court of Appeals No. 283275.

PEOPLE v OEHLER, No. 136070. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279835.

PEOPLE v GREER, No. 136072. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281980.

PEOPLE v DWAYNE WILLIAMS, No. 136086. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279777.

PEOPLE v ANTHONY POWERS, No. 136093. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282359.

PEOPLE v MACKIN and PEOPLE v WOZNIAK, Nos. 136124 and 136125; Court of Appeals Nos. 281229 and 281230.

PEOPLE v BILLY POWELL, No. 136142. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282376.

PEOPLE v DAVID, No. 136156. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279937.

PEOPLE v PEOPLES, No. 136157; Court of Appeals No. 281986.

PEOPLE v ERICK REED, No. 136161. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279601.

PEOPLE v IJOMA RAYMOND, No. 136167. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279447.

PEOPLE v BOBBY WILLIAMS, No. 136169. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279882.

PEOPLE v JESSE JONES, No. 136170. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279976.

PEOPLE v GLENN, No. 136179; Court of Appeals No. 283109.

PEOPLE v MONTEZ COOPER, No. 136181. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282525.

PEOPLE v HINE, No. 136186. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283219.

PEOPLE v WOOTEN, No. 136219. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 283691.

JONES v DEPARTMENT OF CORRECTIONS, No. 136221; Court of Appeals No. 279712.

PEOPLE v FREEZEL JONES, JR, No. 136240. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280570.

PEOPLE v SAMS, No. 136256; Court of Appeals No. 282506.

BURKE v BURKE RENTAL SERVICES, INC, No. 136277; Court of Appeals No. 275828.

PEOPLE v BROOKS, No. 136286; Court of Appeals No. 283880.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v THOMPKINS, No. 136305. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281974.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v ALTMAN, Nos. 136311 and 136313. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 281963 and 281965.

PEOPLE v COATS, No. 136325. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282339.

PEOPLE v BLANKS, No. 136337; Court of Appeals No. 255257.

PEOPLE v DUNCIL, No. 136343; Court of Appeals No. 273116.

PEOPLE v JERMAINE MURPHY, No. 136408; Court of Appeals No. 277104.

PEOPLE v WRENFROW, No. 136410; Court of Appeals No. 283693.

GRAND RAPIDS HOUSING COMMISSION v OHIO FARMERS INSURANCE COMPANY, No. 136414; Court of Appeals No. 273513.

BAERE COMPANY v ADVANTAGE 99 TD, No. 136417; Court of Appeals No. 268238.

PEOPLE v KELLY POWELL, No. 136422; reported below: 278 Mich App 318.

PEOPLE v HOGG, No. 136429; Court of Appeals No. 283738.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

VEMULAPALLI v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 136443; Court of Appeals No. 279705.

PEOPLE v MOUSSAED, No. 136444; Court of Appeals No. 275730.

PEOPLE v HILL, No. 136449; Court of Appeals No. 284343.

PEOPLE v GOODWILL, No. 136464; Court of Appeals No. 275244.

PEOPLE v FREDRICK ROBINSON, No. 136477; Court of Appeals No. 276889.

PEOPLE v MCCOY, No. 136478; Court of Appeals No. 274834.

PEOPLE v HOLTZ, No. 136480; Court of Appeals No. 274008.

BURLINGAME v NATIONSRENT, INC, No. 136482; Court of Appeals No. 284294.

PEOPLE v STOCKS, No. 136483; Court of Appeals No. 275683.

PEOPLE v ROBERT JENKINS, No. 136485; Court of Appeals No. 284475.

SPECTRUM HEALTH v TITAN INSURANCE COMPANY, No. 136486; Court of Appeals No. 275341.

PEOPLE v JEREMY JOSEPH, No. 136487; Court of Appeals No. 273587.

PEOPLE v ANTHONY SPRAGGINS, No. 136489; Court of Appeals No. 275844.

PEOPLE v GREGORY SNYDER, No. 136493; Court of Appeals No. 283720.

PEOPLE v ROBERTS, No. 136494; Court of Appeals No. 284026.

PEOPLE v SCHAAF, No. 136497; Court of Appeals No. 282969.

PEOPLE v KIRKLAND, No. 136511; Court of Appeals No. 281387.

PEOPLE v JEDLICKI, No. 136513; Court of Appeals No. 281022.

PEOPLE v BALLINGER, No. 136522; Court of Appeals No. 275752.

PEOPLE v NORMAN, No. 136529; Court of Appeals No. 277990.

PEOPLE v FORREST, No. 136536. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281018.

PEOPLE v MANSFIELD, No. 136537; Court of Appeals No. 277155.

PEOPLE v MCCARTY, No. 136538; Court of Appeals No. 276997.

PEOPLE v HOSKINS, No. 136544; Court of Appeals No. 282037.

VANVORST v MAXITROL COMPANY, No. 136545; Court of Appeals No. 278995.

PEOPLE v QUATRINE, No. 136549; Court of Appeals No. 272074.

PEOPLE v LUSTIG, No. 136553; Court of Appeals No. 272994.

BLEAU v GENERAL MOTORS CORPORATION, No. 136555; Court of Appeals No. 281260.

PEOPLE v TAUREAN JENKINS, No. 136556; Court of Appeals No. 284454.

WILSON v COMCAST CABLEVISION CORPORATION, No. 136557; Court of Appeals No. 281228.

PEOPLE v KEMMER, No. 136565; Court of Appeals No. 283552.

PEOPLE v NICHOLS, No. 136569; Court of Appeals No. 276246.

PEOPLE v ALBERT THOMAS, No. 136571; Court of Appeals No. 284025.

PEOPLE v ALIF, No. 136582; Court of Appeals No. 283837.

PEOPLE v RASHAD MOORE, No. 136584; Court of Appeals No. 275691.

JACOBSON v NORFOLK DEVELOPMENT CORPORATION, Nos. 136586 and 136588; Court of Appeals Nos. 281587 and 283361.

PEOPLE v EATON, No. 136590; Court of Appeals No. 283031.

VAN BUREN v PANTHER CRANKSHAFTS, No. 136593; Court of Appeals No. 275435.

PEOPLE v DARRON ANDERSON, No. 136598; Court of Appeals No. 283972.

PEOPLE v MACKEY, No. 136603; Court of Appeals No. 285067.

BROWN v DEPARTMENT OF CORRECTIONS, No. 136604; Court of Appeals No. 281710.

WESTMOORE APARTMENTS v MORRIS, No. 136605; Court of Appeals No. 281539.

PEOPLE v JAMES SIMMONS, No. 136608; Court of Appeals No. 277239.

PEOPLE v JASON FRANKLIN, No. 136610; Court of Appeals No. 284109.

PEOPLE v HYLAND STERLING, No. 136611; Court of Appeals No. 270838.

PEOPLE v MICHAEL FREEMAN, No. 136632; Court of Appeals No. 283350.

PEOPLE v FARRAR, No. 136633; Court of Appeals No. 284072.

PEOPLE v EARL, No. 136638; Court of Appeals No. 284561.

PEOPLE v DEMON ATKINS, No. 136642; Court of Appeals No. 284627.

PEOPLE v ANDREW BELL, No. 136643; Court of Appeals No. 274771.

PEOPLE v RINCONES, No. 136651; Court of Appeals No. 284460.

BEGIN v MICHIGAN BELL TELEPHONE COMPANY/SBC, No. 136654; Court of Appeals No. 280717.

LABARGE v WALGREEN COMPANY, No. 136655; Court of Appeals No. 281923.

PEOPLE v NICKERSON, No. 136667; Court of Appeals No. 283594.

PEOPLE v REYNAURD PERKINS, No. 136668; Court of Appeals No. 282776.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v SHAWN WILLIAMS, No. 136677; Court of Appeals No. 277006.

JOY v JOY, No. 136681; Court of Appeals No. 274854.

PEOPLE v GRIFFITH, No. 136682. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281785.

ICHESCO v KIRCHER, No. 136683; Court of Appeals No. 272905.

PEOPLE v WYNN, No. 136684; Court of Appeals No. 277619.

PEOPLE v OWEN, No. 136692; Court of Appeals No. 284491.

PEOPLE v BENNER, No. 136703; Court of Appeals No. 284808.

CIARAMITARO v GREEKTOWN CASINO, LLC, No. 136707; Court of Appeals No. 284781.

PEOPLE v SYLVESTER WATKINS, No. 136711; Court of Appeals No. 284477.

PEOPLE v GIBISAS, No. 136712; Court of Appeals No. 284734.

PEOPLE v WALDON, No. 136724; Court of Appeals No. 276152.

HOLMES v GENERAL MOTORS CORPORATION, No. 136745; Court of Appeals No. 281446.

PEOPLE v BOYT, No. 136762; Court of Appeals No. 272728.

PEOPLE v RIVAS, No. 136777; Court of Appeals No. 276592.

LESLIE v COCA COLA ENTERPRISES, No. 136783; Court of Appeals No. 283488.

Reconsiderations Denied September 9, 2008:

PEOPLE v QUINTANILLA, No. 130599. Leave to appeal denied at 481 Mich 909. Court of Appeals No. 266178.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Houlihan*, 480 Mich 1165 (2008).

PEOPLE v TINCHER, No. 134816. Leave to appeal denied at 481 Mich 822. Court of Appeals No. 277654.

GALLANT v GALLANT, No. 134902. Leave to appeal denied at 480 Mich 1134. Court of Appeals No. 265396.

MCLEOD v DEPARTMENT OF TREASURY, No. 135380. Leave to appeal denied at 480 Mich 1135. Court of Appeals No. 280282.

BRASHERS v VANDERROEST, No. 135427. Leave to appeal denied at 481 Mich 858. Court of Appeals No. 279999.

WEAVER and KELLY, JJ. We would grant the motion for reconsideration.

PEOPLE v FERQUERON, No. 135516. Leave to appeal denied at 481 Mich 911. Court of Appeals No. 281278.

PEOPLE v FAHRNER, No. 135875. Leave to appeal denied at 481 Mich 878. Court of Appeals No. 269255.

NSK CORPORATION v DEPARTMENT OF TREASURY, No. 135997. Summary disposition entered at 481 Mich 884. Reported below: 277 Mich App 692..

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

CORRION v LIVINGSTON CIRCUIT JUDGE, No. 136121. Leave to appeal denied at 481 Mich 915. Court of Appeals No. 284024.

PEOPLE v PEREZ-CHICA, No. 136288. Leave to appeal denied at 481 Mich 917. Court of Appeals No. 276153.

Summary Dispositions September 10, 2008:

PEOPLE v STANLEY BROWN, No. 134137. By order of April 28, 2008, the prosecuting attorney was directed to answer the application for leave to appeal the May 14, 2007, order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for a hearing to determine whether defendant received the effective assistance of counsel, and whether newly discovered evidence produced in the civil suit filed on behalf of the complainant requires a new trial. *People v Ginther*, 390 Mich 436 (1973). In reviewing the assistance provided by counsel, the circuit court shall determine if the defendant's trial attorney was ineffective for failing to procure the National Council on Alcoholism and Drug Dependence staff activity logs before trial, and for failing to cross-examine the complainant regarding inconsistencies in her trial testimony, and between her trial testimony, preliminary examination testimony, and what she claimed in the initial police report.

We further order the Wayne Circuit Court, in accordance with Administrative Order No. 2003-3, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in the proceedings on remand. We do not retain jurisdiction. Court of Appeals No. 274184.

PEOPLE v PUTRUS, No. 135762. The motion for miscellaneous relief is granted. The application for leave to appeal the December 20, 2007, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the defendant's argument that the trial court erroneously permitted the introduction of evidence of prior drug transactions under MRE 404(b). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 280767.

PEOPLE v KEITH DAVIS, No. 136073. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the

Court of Appeals, and we remand this case to the Kent Circuit Court for reconsideration of scoring offense variable 10, MCL 777.40, in light of this Court's decision in *People v Cannon*, 481 Mich 152 (2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Reported below: 277 Mich App 676.

PEOPLE v STROSS, No. 136235. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. Defendant received a variance to paint an oversized sign from the local Zoning Board of Appeals, under specified conditions, on July 15, 1997. In 2005, a jury convicted defendant under a local ordinance for violating these conditions. The Court of Appeals concluded that the condition prohibiting "lettering" was "an unconstitutional regulation of speech, infringing on defendant's First Amendment protections," and reversed the conviction.

The Court of Appeals erroneously reached this conclusion, in our judgment. At the time defendant's variance was granted, then-current MCL 125.585(11) required a party to challenge the constitutionality of the variance within 21 days. Defendant's painting the word "LOVE" on the sign clearly violated the "lettering" condition of the variance. Because this statute prescribed the relevant procedure for challenging the constitutionality of the conditions, defendant was obligated to challenge these conditions in accordance with this procedure. His failure to do so precludes him from raising his constitutional challenge eight years later. See *Finlayson v West Bloomfield Twp*, 320 Mich 350, 357-358 (1948) (requiring a claim to be filed within the time period specified by statute); *City of Troy v Aslanian*, 170 Mich App 523, 530 (1988) ("A party who has accepted and retained the advantages of a variance granted on condition is estopped to attack the propriety of the condition."). Because the Court of Appeals did not address the remainder of defendant's issues on appeal, we remand to the Court of Appeals to consider defendant's remaining arguments. Court of Appeals No. 271764.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v MAHON, No. 136251. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the challenge to the scoring of offense variable 10, MCL 777.40, in light of *People v Cannon*, 481 Mich 152 (2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 283086.

WEAVER and CORRIGAN, JJ. We would deny leave to appeal.

PEOPLE v FISHER HOTEL, No. 136306. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Genesee Circuit Court for entry of an order granting the plaintiff's motion for summary disposition. Court of Appeals No. 274009.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v WATTS, No. 136495. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals. Reversal of the defendant's convictions is not the proper remedy for the trial court's failure to articulate its reasons for admitting a prior conviction for impeachment on the record, as required by MRE 609(b). While retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne Circuit Court with directions to make a record of its decision to permit impeachment of the defendant with an armed robbery conviction. Upon completion of that analysis by the trial court, the Court of Appeals shall consider whether the trial court abused its discretion in admitting the prior conviction and, if not, shall also consider the other issues raised by the defendant, but not addressed during the initial review of the case. We do not retain jurisdiction. Court of Appeals No. 272369.

KELLY, J. I would deny leave to appeal.

CORRIGAN, J. I would reverse the judgment of the Court of Appeals for the reasons stated by the dissenting judge, and remand this case to the Court of Appeals for consideration of other issues raised by the defendant.

Leave to Appeal Denied September 10, 2008:

PEOPLE v CHAMBERS, No. 135736. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to stay and the motion for miscellaneous relief are denied. This order does not prevent the defendant from filing a second motion for relief from judgment based on newly discovered evidence under MCR 6.502(G)(2). Court of Appeals No. 277828.

PEOPLE v REGINALD WILLIAMS, No. 136068; Court of Appeals No. 273054.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v GARTH, No. 136187; Court of Appeals No. 276597.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v EDDIE ANDERSON, IV, No. 136220; Court of Appeals No. 274237.

Summary Disposition September 16, 2008:

PEOPLE v VANDENBERG, No. 136867. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the substantive issues contained in Issues IV and V in the application previously filed in the Court of Appeals in this case. Issues IV and V are to be heard with the sentencing issues on which the Court of Appeals has already granted the defendant's application for leave to appeal. In all other respects, the

application for leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 285309.

Leave to Appeal Granted September 17, 2008:

PEOPLE v RICHARD BRYANT, No. 133725. The application for leave to appeal the March 6, 2007, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether testimony about Anthony Covington's statements to the police constituted inadmissible testimonial hearsay within the meaning of *Crawford v Washington*, 541 US 36 (2004), and *Davis v Washington*, 547 US 813 (2006).

The Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, and the Criminal Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 247039.

HUNTER v HUNTER, No. 136310. The application for leave to appeal the March 20, 2008, judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether the standard for parental fitness in *Mason v Simmons*, 267 Mich App 188, 206 (2005), and the courts' application of *Mason* here violate a natural parent's fundamental rights to his or her child, see *Troxel v Granville*, 530 US 57 (2000); (2) if a natural parent is found to have been unfit under the appropriate standard and his or her lack of fitness led to the child's established custodial environment with a third party, whether the parent's later fitness at the time he or she seeks custody is relevant to a proper fitness determination; (3) whether the lower courts here properly applied the Child Custody Act's presumption favoring the children's established custodial environment, MCL 722.27(1)(c), instead of the presumption in favor of natural parents, MCL 722.25(1), compare *Heltzel v Heltzel*, 248 Mich App 1 (2001); (4) whether the trial court's finding of parental unfitness here was against the great weight of the evidence; and (5) whether the trial court's determinations regarding the best interests of the children were against the great weight of the evidence. Court of Appeals No. 279862.

JACKSON v ESTATE OF GREEN, No. 136423. The parties shall include among the issues to be briefed: (1) whether a partition action filed by an individual who jointly owns real estate with other persons survives the individual's death, if the form of joint ownership is an ordinary joint tenancy that does not expressly grant rights of survivorship; (2) if so, whether the deed nevertheless automatically transfers to the surviving owner upon the deceased owner's death if a partition order had not been entered before the death; (3) when a cause of action accrues, and the statute of limitations begins to run, for breach of verbal loan that did not include explicit terms for repayment; (4) whether the lender must demand payment on such a loan within a specified period after the loan is made;

and (5) whether the statute of limitations barred plaintiff's suit on her loan(s) to the decedent. Court of Appeals No. 269244.

Summary Dispositions September 17, 2008:

PEOPLE v CHADWICK, No. 136146. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 280256.

PEOPLE v TUDOR, No. 136209. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court. At sentencing, the defendant requested a number of corrections to the presentence investigation report, and the court indicated that most of the changes would be made. The copy of the report in the record does not reflect those changes. On remand, the circuit court shall assure that a corrected copy of the report is prepared and transmitted to the Department of Corrections per MCR 6.425. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 283090.

BRADDOCK v JGR, INC, No. 136236. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. See MCL 445.1862(1), which provides that "[a] regulated lender is not liable for a violation of this act if the regulated lender has fully complied with the federal Truth in Lending Act, 15 USC 1601 *et seq*. (TILA), and *Mourning v Family Publication Svcs, Inc,* 411 US 356 (1973), and other federal caselaw construing TILA's definition of "finance charge." Court of Appeals No. 278982.

RIEBSCHLEGER v RIEBSCHLEGER, No. 136323. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals that affirmed the circuit court's distribution of marital assets. The circuit court did not make sufficient findings to allow this Court to determine, on review, whether the division of marital property was equitable. See *Koy v Koy,* 274 Mich App 653, 660 (2007). We remand this case to the Saginaw Circuit Court to make detailed findings of fact regarding the identity and value of both the marital assets and the separate assets of the parties, including marital debts and separate debts of the parties. The circuit court shall then determine the percentage of the marital estate to be awarded to each party. The circuit court may, in its discretion, consider redistribution of assets. If the division of marital property significantly departs from congruence between the parties, the circuit court shall clearly explain its rationale for the unequal division. See *McNamara v Horner*, 249 Mich App 177, 188 (2002). We do not retain jurisdiction. Court of Appeals No. 270226.

STONE v RW LAPIN, INC, No. 136438. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of

Appeals and we reinstate the order of the Board of Magistrates. The Court of Appeals erred by approving the Workers' Compensation Appellate Commission's (WCAC) basis for modifying the magistrate's benefit award. The WCAC exceeded its authority by substituting its own favorable view of the testimony of the plaintiff's medical expert for the unfavorable assessment provided by the magistrate without providing a weighing of the proofs and an analysis as to why that expert's credibility should be evaluated in a contrary manner. The WCAC also erred by shifting the burden of proving work-related injury from the plaintiff, where it belonged pursuant to MCL 418.851, to the defendants, by presuming the plaintiff's entitlement to benefits upon the mere rejection of some of the magistrate's numerous reasons for ruling in a contrary manner. In addition, the Court of Appeals erred by holding that the average weekly wage must be calculated pursuant to MCL 418.371(3) in every instance where it can be determined using that subsection. The average weekly wage calculation provisions reveal "the Legislature's overriding desire to have the basis for compensation reflect an accurate measure of wages." *Rowell v Security Steel Processing Co,* 445 Mich 347, 356-357 (1994). In this case, the magistrate did not err in choosing to utilize MCL 418.371(6) to determine the plaintiff's average weekly wage. Court of Appeals No. 275684.

KELLY, J. I would deny leave to appeal.

In re ROSS (DEPARTMENT OF HUMAN SERVICES V ROSS), No. 137045. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the November 26, 2007, order of the Clinton Circuit Court, Family Division, terminating the respondent-mother's parental rights to the minor children. The Court of Appeals misapplied the clear error standard by substituting its judgment for that of the trial court, MCR 2.613(C); *In re Miller,* 433 Mich 331 (1989), and rendered a decision that was contrary to the clear and convincing evidence supporting termination of the respondent-mother's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We remand this case to the Clinton Circuit Court, Family Division, for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 282514.

MARKMAN, J. I would deny leave to appeal.

Leave to Appeal Denied September 17, 2008:

PEOPLE V DRAUGHN, No. 135367; Court of Appeals No. 279041.

KELLY, J. I would grant reconsideration and, on reconsideration, would reverse the August 1, 2007, decision of the Court of Appeals and remand this case to the trial court for resentencing.

PEOPLE V GULLEY, No. 135468; Court of Appeals No. 276266.

PEOPLE V JOHN SNYDER, No. 135645; Court of Appeals No. 272542.

PEOPLE V WILLIE SANDERS, No. 135948. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279141.

PEOPLE v KIMBLE, No. 135955. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 278902.

MARKMAN, J. (*concurring*). Because the trial court refused to allow defendant to present evidence that the complainant's mother had previously made the same kind of unsubstantiated allegations of sexual abuse against the complainant's biological father that the complainant made against defendant under substantially similar circumstances, I continue to be persuaded that defendant did not receive a fair trial. However, because a majority of this Court has already denied leave to appeal on this issue, *People v Kimble,* 470 Mich 871 (2004), and because the issues that defendant raises in this appeal are, in my judgment, meritless, I concur in this order. Nonetheless, I continue to view this case as a miscarriage of justice.

PEOPLE v BINIENDA, No. 136010; Court of Appeals No. 273485.

PEOPLE v LITTLE, No. 136231; Court of Appeals No. 282773.

KELLY, J. I would allow the defendant to withdraw his guilty plea.

PEOPLE v DAVID JONES, No. 136242; Court of Appeals No. 282363.

PEOPLE v FARRELL, No. 136247; Court of Appeals No. 273907.

KELLY, J. I would grant leave to appeal.

SMITH v ADVANCE TEMPORARY SERVICES, INC, No. 136304; Court of Appeals No. 280582.

CORRIGAN, J. I would refer attorney Stephen J. Smith to the Attorney Grievance Commission due to his behavior at the hearing before the magistrate.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v D & H MARKET, INC, No. 136329; Court of Appeals No. 280556.

PEOPLE v BRIAN WHITE, No. 136357; Court of Appeals No. 276990.

KELLY, J. I would grant leave to appeal.

STOUGH v JETT SETT MANAGEMENT SERVICES, LLC and STOUGH v GENERAL MOTORS CORPORATION, Nos. 136374 and 136375; Court of Appeals Nos. 274167 and 275441.

FULLER v ESFAHANI, No. 136394; Court of Appeals No. 271368.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

NEAL v DEPARTMENT OF CORRECTIONS, No. 136925; Court of Appeals No. 285232.

TAYLOR, C.J., did not participate.

Leave to Appeal Granted September 19, 2008:

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 136431. The application for leave to appeal the April 1, 2008, judgment of the Court of

Appeals is considered, and it is granted, limited to the issue whether "transmission costs" may be included in the power supply cost recovery factor, MCL 460.6j(1)(a) and (b).

We further order that this case be argued and submitted to the Court together with the case of *In re Application of Detroit Edison Company* (Docket Nos. 134667-134669, 134671, 134673, 134674, 134676, 134677), at such future session of the Court as both cases are ready for submission. Court of Appeals No. 261747.

In re APPLICATION OF DETROIT EDISON COMPANY, Docket Nos. 134667, 134668, 134669, 134671, 134673, 134674, 134676, and 134677. The motion of Detroit Edison Company to exceed the page limit is granted. The applications for leave to appeal the July 3, 2007, judgment of the Court of Appeals is considered, and they are granted, limited to: (1) whether "transmission costs" may be included in the power supply cost recovery factor, MCL 460.6j(1)(a) and (b); and (2) whether the Court of Appeals erred in concluding that the Public Service Commission's decision to prohibit recovery of the control premium that DTE Energy paid to acquire MCN Energy by including the premium in Detroit Edison's rates was not supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 101 (2008).

We further order that these cases be argued and submitted to the Court together with the case of *Attorney General v Public Service Commission* (Docket No. 136431), at such future session of the Court as these cases are ready for submission. Court of Appeals Nos. 259845, 264099, 264191, 264131, 264156.

Summary Dispositions September 19, 2008:

ROBELIN V SPECTRUM HEALTH HOSPITALS, No. 135597. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, for consideration, as on leave granted, of whether the trial court abused its discretion when it denied the defendants' motion to strike the testimony of Ronald Gabriel, M.D. In particular, we direct the Court of Appeals to consider whether Dr. Gabriel's proposed testimony meets the criteria of MCL 600.2955 and MRE 702. See *Craig v Oakwood Hosp*, 471 Mich 67 (2004), and *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004). We do not retain jurisdiction. Court of Appeals No. 279780.

KELLY, J. I would deny leave to appeal.

ANDRES V BROWN, No. 136294. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals, but for a different reason. The defendant, who was "the elective or highest appointive executive official of [a] level[] of government . . . acting within the scope of his executive authority[,]" MCL 691.1407(5), was absolutely immune from tort liability. Court of Appeals No. 276473.

MALLOY v DSI ACOUSTICAL COMPANY, No. 136561. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to that court for plenary consideration. In particular, we direct the Court of Appeals to consider whether, contrary to the WCAC's finding, the testimony of Dr. John A. Sauchak, as found by the magistrate, supports a specific event injury on October 11, 2003. We also direct the Court of Appeals to consider whether the WCAC misapplied its standard of review, MCL 418.861a(3), by neglecting to address the other evidence in the record that was utilized by the magistrate to find an October 11, 2003, injury date. See *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691, 703-704 (2000). Finally, we direct the Court of Appeals to consider the arguments raised by the cross-appellants in this Court and this Court's decision in *Stokes v Chrysler LLC,* 481 Mich 266 (2008). Court of Appeals No. 280855.

WEAVER, J. (*dissenting*). I dissent from the order vacating the order of the Court of Appeals and remanding this case to the Court of Appeals for consideration of the arguments raised by the cross-appellants in this Court and this Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in this Court's decision in *Stokes v Chrysler LLC*, 481 Mich at 320 (WEAVER, J., dissenting), I would grant leave to appeal in this case to consider whether a majority of this Court reached the correct decision in *Stokes*.

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

Leave to Appeal Denied September 19, 2008:

ADRIAN ENERGY ASSOCIATION, LLC v PUBLIC SERVICE COMMISSION, No. 136407; Court of Appeals No. 261718.

PEOPLE v GURDA, No. 136426; Court of Appeals No. 283690.

KELLY, J. I would remand this case for resentencing in light of *People v Cannon*, 481 Mich 152 (2008).

MICHIGAN ENVIRONMENTAL COUNCIL v PUBLIC SERVICE COMMISSION, No. 136433; Court of Appeals No. 264860.

Summary Dispositions September 22, 2008:

PEOPLE v STEVEN HARRIS, No. 135272. By order of April 23, 2008, the prosecuting attorney was directed to answer the application for leave to appeal the October 4, 2007, order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the amended judgment of sentence entered on September 6, 2006, remand this case to the Kent Circuit

Court, and direct that court to reinstate the original judgment of sentence entered on June 14, 2006. As the prosecution concedes, when the defendant was originally sentenced in this case, he had been discharged from parole by the Michigan Department of Corrections, such that the original judgment of sentence was valid. As the prosecution also concedes, the Kent Circuit Court therefore did not have the authority to later modify that valid original judgment of sentence. See MCR 6.429(A)(1); *People v Miles*, 454 Mich 90, 96 (1997). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 280100.

PEOPLE v RADTKE, No. 136472. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to grant credit for time that the defendant spent in jail awaiting resolution of the case. Though the defendant was not entitled to bail under Const 1963, art 1, § 15, because she was charged with murder and the proof was evident, this did not affect her eligibility for sentence credit under MCL 769.11b. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 283303.

PEOPLE v TIMOTHY BROWN, No. 136621. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 283433.

PEOPLE v CARRIER, No. 136649. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Oakland Circuit Court, and we remand this case to the trial court for resentencing. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range and for the extent of the departure, in accordance with *People v Babcock*, 469 Mich 247 (2003), and *People v Smith,* 482 Mich 292 (2008). We do not retain jurisdiction. Court of Appeals No. 284119.

Leave to Appeal Denied September 22, 2008:

PEOPLE v ORR, No. 134330; Court of Appeals No. 267189.

BAUMGART v STATE OF MICHIGAN, No. 135859; Court of Appeals No. 279142.

PEOPLE v GARRETT, No. 135900. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282182.

PEOPLE v FALK, No. 135928; Court of Appeals No. 281400.

PEOPLE v MCCULLOCH, No. 136045; Court of Appeals No. 282557.

PEOPLE v STANLEY MILLER, No. 136081; Court of Appeals No. 279366.

PEOPLE v JEFFREY BROWN, No. 136085. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279572.

PEOPLE v ADAMS, No. 136154. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283144.

PEOPLE v HERNDON, No. 136195. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282207.

PEOPLE v PEARSON, No. 136196; Court of Appeals No. 279654.

PEOPLE v GOULAIS, No. 136198. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282665.

PEOPLE v THEODORE WILLIAMS, No. 136212. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280206.

PEOPLE v DESMOND JOSEPH, No. 136267. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282646.

PEOPLE v RICHARD ROBERTSON, No. 136314. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 283318.

PEOPLE v DEAN ROBINSON, No. 136332. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279939.

PEOPLE v JOSE RODRIGUEZ, No. 136335. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279394.

PEOPLE v ASKEW, No. 136340. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281315.

PEOPLE v WILLIAM JOHNSON, No. 136353. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279811.

PEOPLE v ELLIS ROBINSON, JR, No. 136359. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282155.

PEOPLE v ANTHONY CAMPBELL, No. 136369. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283606.

PEOPLE v FIELDS, No. 136386. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court

of Appeals No. 282787.

PEOPLE v BOSTON, No. 136388; Court of Appeals No. 282945.

PEOPLE v JERRY COLEMAN, No. 136409; Court of Appeals No. 283882.

PEOPLE v GILBERT, No. 136415; Court of Appeals No. 284076.

PEOPLE v CLIFTON MOFFAT, No. 136418. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280756.

PEOPLE v DERRICK BOYD, No. 136428. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283539.

PEOPLE v PADGETT, No. 136465. The denial is without prejudice to the defendant's seeking relief, pursuant to MCR 6.500 *et seq.*, as to the new issues raised in his application supplement. Court of Appeals No. 283499.

PEOPLE v SCOTT, No. 136481. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279874.

KIMMELMAN v HEATHER DOWNS MANAGEMENT LIMITED, No. 136488; reported below 278 Mich App 569.

PEOPLE v ERVIN SIMS, No. 136492. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283357.

PEOPLE v COWANS, No. 136499; Court of Appeals No. 283884.

PEOPLE v DOUGLAS CLARK, No. 136531; Court of Appeals No. 284029.

PEOPLE v MARQUIS VANCE, No. 136540; Court of Appeals No. 274579.

PEOPLE v THOMASON, No. 136541; Court of Appeals No. 277934.

PEOPLE v TERRANCE JONES, No. 136560; Court of Appeals No. 274094.

In re ERVIN TESTAMENTARY TRUST (EVANS v BANK ONE TRUST COMPANY, NA), No. 136564; Court of Appeals No. 270498.

PEOPLE v KELVIN MILLER, No. 136581; Court of Appeals No. 277776.

PEOPLE v HART, No. 136589; Court of Appeals No. 272910.

SHELBY TOWN CENTER I, LLC v GORMAN'S LAKESIDE, LLC, No. 136616; Court of Appeals No. 273689.

PEOPLE v DEANGELO DIXON, No. 136620; Court of Appeals No. 277301.

PEOPLE v RAGLAND, No. 136624; Court of Appeals No. 284416.

PEOPLE v MORAN-DOPICO, No. 136630; Court of Appeals No. 276455.

PEOPLE v HEARD, No. 136639; Court of Appeals No. 280143.

PEOPLE v ROBERT POWELL, III, No. 136641; Court of Appeals No. 274264.

PEOPLE v MONCRIEF, No. 136644; Court of Appeals No. 284073.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v GARLAND HALL, No. 136658; Court of Appeals No. 281834.

PEOPLE v PATTON, No. 136664; Court of Appeals No. 283835.

PEOPLE v GENE KELLEY, No. 136669; Court of Appeals No. 277020.

PEOPLE v GROSS, No. 136671; Court of Appeals No. 283613.

PEOPLE v LUCKETT, No. 136678; Court of Appeals No. 284521.

PEOPLE v PARRIS, No. 136685; Court of Appeals No. 281950.

PEOPLE v KEITH WATKINS, No. 136689; Court of Appeals No. 277519.

PEOPLE v UPHAUS, No. 136693; reported below: 278 Mich App 174.

PEOPLE v REITMEYER, No. 136699; Court of Appeals No. 276207.

PEOPLE v LYNN JACKSON, No. 136705; Court of Appeals No. 275086.

PEOPLE v BALLENTINE, No. 136706; Court of Appeals No. 275205.

PEOPLE v CHAUDHRY, No. 136708; Court of Appeals No. 284471.

PEOPLE v DANIELS, No. 136709; Court of Appeals No. 272218.

PEOPLE v EDWARD GARLAND, No. 136715; Court of Appeals No. 274058.

LEWIS v DAYTON FREIGHT LINES, No. 136723; Court of Appeals No. 281810.

BEECHLER v BEECHLER, No. 136725; Court of Appeals No. 282623.

PEOPLE v MONTGOMERY, No. 136726; Court of Appeals No. 265463.

PEOPLE v WILKES, No. 136727; Court of Appeals No. 285117.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v ROEBUCK, No. 136729; Court of Appeals No. 279555.

PEOPLE v VAUGHN, No. 136730; Court of Appeals No. 284470.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

SHULICK v DEPARTMENT OF CORRECTIONS, No. 136732; Court of Appeals No. 285128.

CHALFIN v JERKINS, No. 136736; Court of Appeals No. 274168.

PEOPLE v BENJAMIN WRIGHT, No. 136740; Court of Appeals No. 277215.

PEOPLE v HOLLINS, No. 136744; Court of Appeals No. 272181.

STATE TREASURER v HAYDEN, No. 136747; Court of Appeals No. 277138.

PEOPLE v MCCAULEY, No. 136750; Court of Appeals No. 281517.

PEOPLE v WARREN, No. 136758; Court of Appeals No. 277154.

PEOPLE v ZIGLER, No. 136760; Court of Appeals No. 273405.

PEOPLE v ZUNIGA, No. 136773; Court of Appeals No. 285303.

PEOPLE v GREEN, No. 136774; Court of Appeals No. 274097.

PEOPLE v RANDALL JONES, No. 136789; Court of Appeals No. 278300.

PEOPLE v BOURGEOIS, No. 136793; Court of Appeals No. 278278.

FISHER v ZEBROWSKI, No. 136794; Court of Appeals No. 281823.

PEOPLE v LAMAR WRIGHT, No. 136796; Court of Appeals No. 278190.

PEOPLE v KERSEN, No. 136798; Court of Appeals No. 276766.

PEOPLE v STEWARD, No. 136806; Court of Appeals No. 284962.

PEOPLE v CLIFTON MOFFAT, No. 136810. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285333.

PEOPLE v TRACEY PIERCE, No. 136832; Court of Appeals No. 274869.

PEOPLE v DALTON, No. 136833; Court of Appeals No. 273686.

PEOPLE v GRAYS, No. 136843; Court of Appeals No. 283689.

PEOPLE v REHKOPF, No. 136848; Court of Appeals No. 285310.

PEOPLE v BREWER, No. 136858; Court of Appeals No. 277518.

PEOPLE v WILLIAM MILLER, No. 136869; Court of Appeals No. 277153.

PEOPLE v KITCHENS, No. 136872; Court of Appeals No. 284490.

PEOPLE v MEDLEY, No. 136874; Court of Appeals No. 285226.

PEOPLE v LACKEY, No. 136879; Court of Appeals No. 275085.

PEOPLE v NOVAK, No. 136890; Court of Appeals No. 285085.

PEOPLE v PEGGY WHITE, No. 136901; Court of Appeals No. 284694.

PEOPLE v TAYA PALMER, No. 136909; Court of Appeals No. 285335.

PEOPLE v HUGHES, No. 136915; Court of Appeals No. 284481.

GRIEVANCE ADMINISTRATOR v GEHRKE, No. 136920; ADB No. 05-29-GA.

MENTOR TOWNSHIP v HOY, No. 136941; Court of Appeals No. 283469.

PEOPLE v ROE, No. 136994; Court of Appeals No. 281544.

Reconsiderations Denied September 22, 2008:

PEOPLE v GOLDMAN, No. 135102. Leave to appeal denied at 481 Mich 889. Court of Appeals No. 268842.

PEOPLE v VLIET, No. 135500. Leave to appeal denied at 481 Mich 911. Court of Appeals No. 278197.

PEOPLE v CARLESS, No. 135564. Leave to appeal denied at 481 Mich 912. Court of Appeals No. 277913.

PAVLOVSKIS v CITY OF EAST LANSING, No. 135742. Leave to appeal denied at 481 Mich 926. Court of Appeals No. 275236.

PEOPLE v CARICO, No. 135763. Leave to appeal denied at 481 Mich 913. Court of Appeals No. 277960.

KELLY, J. I would grant reconsideration.

PEOPLE v REDDELL, No. 135869. Leave to appeal denied at 482 Mich 892. Court of Appeals No. 282057.

BOB TURNER, INC v FRISBEE, No. 136027. Leave to appeal denied at 481 Mich 914. Court of Appeals No. 279850.

ADAMS v ORION CHARTER TOWNSHIP, No. 136141. Leave to appeal denied at 481 Mich 916. Court of Appeals No. 275376.

PEOPLE v BENSON JACKSON, No. 136435. Leave to appeal denied at 482 Mich 897. Court of Appeals No. 276351.

PEOPLE v MONICA WRIGHT, No. 136576. Leave to appeal denied at 482 Mich 858. Court of Appeals No. 281918.

Leave to Appeal Granted September 24, 2008:

ROMAIN v FRANKENMUTH MUTUAL INSURANCE, No. 135546. The motion for rehearing is considered and it is granted. This Court's opinion of July 23, 2008, is vacated. The application for leave to appeal the November 21, 2007, order of the Court of Appeals is again considered, and it is granted. The parties shall include among the issues to be briefed whether the Legislature's use of the term "proximate cause" in MCL 600.6304 conflicts with other statutory provisions, whether the Legislature intended to impose a legal duty requirement as a precondition for allocating fault under MCL 600.2957 and MCL 600.6304, and whether, if MCL 600.6304 merely codified the common-law doctrine of negligence, a finding of duty is a prerequisite to a finding of fault.

The Clerk of the Court is directed to place this case on the January 2009 session calendar for argument and submission. Appellant's brief

and appendix must be filed no later than November 10, 2008, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 12, 2008.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae, to be filed no later than December 26, 2008. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, with such briefs to be filed no later than December 26, 2008.Court of Appeals No. 278591.

SELFLUBE, INC v JJMT, INC, No. 136377. The parties shall include among the issues to be briefed: (1) whether the circumstances of the instant case are meaningfully distinguishable from those before this Court in *State Treasurer v Abbott,* 468 Mich 143 (2003), and whether, in light of any such distinguishing circumstances, the permanent injunction's requirements—including that any transfer of funds from defendant James DeHaan's interest in defendant H.S. Die & Engineering, Inc.'s (HSD) 401(k) plan may be made only to a financial institution selected by HSD—are prohibited by 29 USC 1056(d)(1), the Employee Retirement Income Security Act's (ERISA) anti-alienation provision; (2) whether *DaimlerChrysler Corp v Cox*, 447 F3d 967 (CA 6, 2006), should affect this Court's analysis of this case; and (3) whether the permanent injunction is contrary to, and preempted by, 29 USC 1104(a)(1)(D), which provides that "a fiduciary [of an ERISA-qualified plan] shall discharge its duties with respect to a plan solely in the interests of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan."

The AARP, the Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., the Michigan Chamber of Commerce, and the American Bar Association Joint Committee on Employee Benefits are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 261743.

ZAHN v KROGER COMPANY OF MICHIGAN, No. 136382. The parties shall include among the issues to be briefed: (1) whether a contractual indemnification clause limiting the indemnitor's liability to the indemnitor's own negligence, but including delegation of the indemnitee's duties, can support an award of indemnification arising out of the settlement of a negligence claim made against the contractual indemnitee; (2) whether MCL 600.2956 and the abolition of joint and several liability has had any effect on the potential contractual indemnification liability of employers for injuries sustained by their employees; (3) whether a settlement of a suit brought by an injured employee against alleged tortfeasors may legally be viewed as encompassing the damages attributable to the negligence of the employee's employer, where the employer has no tort liability exposure to the injured employee by virtue of the Worker's Disability Compensation Act (WDCA) exclusive remedy, MCL 418.131(1), but has contractually assumed a duty of care owed by an indemnitee; (4) whether, despite the WDCA's exclusive remedy provision,

the third-party defendant employer in this case voluntarily subjected itself to liability for the payment to its employee of damages attributable to its own negligence by entering into the indemnification agreement; and (5) whether the holding in *Gerling Konzern Allegemeine Versicherungs AG v Regents of the Univ of Michigan,* 472 Mich 44 (2005), has any effect on the appropriate resolution of this case.

The Clerk of the Court is directed to place this case on the January 2009 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 10, 2008, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 12, 2008.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae, to be filed no later than December 26, 2008. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, with such briefs to be filed no later than December 26, 2008. Court of Appeals No. 274994.

PETERSEN v MAGNA CORPORATION, Nos. 136542 and 136543. The application for leave to appeal the April 17, 2008, judgment of the Court of Appeals is considered, and it is granted, limited to the issue of the proration of attorney fees in MCL 418.315(1). The parties shall include among the questions to be briefed: (1) what is the meaning of the term "prorate" in the last sentence of § 315(1), and whether that term represents an exception to the American Rule regarding attorney fees (see *Haliw v City of Sterling Hts*, 471 Mich 700, 707 [2005]); (2) whether the magistrate's authority to prorate attorney fees is limited to the parties to the workers' compensation action, and, if so, does the penultimate sentence of MCL 418.315(1) limit which parties are subject to proration; and (3) what is the status, if any, of health care providers and medical insurers in prorating of attorney fees.

The Clerk of the Court is directed to place this case on the January 2009 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than November 10, 2008, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 12, 2008.

The Workers' Compensation Section of the State Bar of Michigan, the Michigan Self-Insurers' Association, and Blue Cross and Blue Shield of Michigan are invited to file briefs amicus curiae, to be filed no later than December 26, 2008. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, with such briefs to be filed no later than December 26, 2008. Court of Appeals Nos. 273293 and 273294.

Summary Dispositions September 24, 2008:

PEOPLE v SAIF, No. 133362. By order of July 18, 2007, the application for leave to appeal the January 16, 2007, order of the Court of Appeals was held in abeyance pending the decision in *People v Cannon* (Docket No. 131994). On order of the Court, the case having been decided on June

4, 2008, 481 Mich 152 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether points for predatory conduct may be assessed for offense variable 10, MCL 777.40(3)(a) (exploitation of vulnerable victim), where the victim is a police decoy, and, if so, whether a defendant's intent to commit other offenses and his entire course of conduct may be considered as "preoffense" conduct for purposes of assessing points for predatory conduct under this Court's decision in *People v Cannon*, *supra*. We do not retain jurisdiction. Court of Appeals No. 273538.

PEOPLE v RUSSELL, No. 133522. By order of July 18, 2007, the application for leave to appeal the February 8, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Cannon*, (Docket No. 131994). On order of the Court, the case having been decided on June 4, 2008, 481 Mich 152 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing defendant's argument regarding whether points for predatory conduct may be assessed for offense variable 10, MCL 777.40(3)(a) (exploitation of a vulnerable victim), where the victim is a police decoy, and we remand this case to the Court of Appeals for reconsideration of that issue in light of *Cannon*, *supra*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 264597.

PEOPLE v KADDIS, No. 133793. By order of October 3, 2007, the application for leave to appeal the March 29, 2007, order of the Court of Appeals was held in abeyance pending the decision in *People v Cannon* (Docket No. 131994). On order of the Court, the case having been decided on June 4, 2008, 481 Mich 152 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether points for predatory conduct may be assessed for offense variable 10, MCL 777.40(3)(a) (exploitation of vulnerable victim), where the victim is a police decoy, and, if so, whether a defendant's intent to commit other offenses and his entire course of conduct may be considered as "preoffense" conduct for purposes of assessing points for predatory conduct under this Court's decision in *People v Cannon*, *supra*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 276562.

SAFIEDINE v CITY OF FERNDALE, No. 136406. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals in part, but vacate, as dicta, the holding that "the [Civil Rights Act, MCL 37.2101 *et seq.*,] substantive antidiscrimination provisions that grant rights and protections apply only to natural, not juridical, persons." *Safiedine v City of Ferndale*, 278 Mich App 476, 481 (2008). The only issue before the court was whether juridical persons could state a cognizable claim for a violation of MCL 37.2302. The court

correctly held that the corporate plaintiffs, as juridical persons, could not state a claim for a violation of § 302 because that section only protects "an individual." However, whether other provisions of the Civil Rights Act permit such claims was not before the court. Compare MCL 37.2302 (prohibiting conduct against an "individual") with MCL 37.2502(1)(a) (prohibiting conduct against "a person") and MCL 37.2504(2) (same) and with MCL 37.2103(g) (defining a "person" as a "corporation"). Reported below: 278 Mich App 476.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MERICKA v DEPARTMENT OF COMMUNITY HEALTH, No. 136460. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 280596.

PEOPLE v MUNLIN, No. 136776. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion. In addition, we note that a portion of the complainant's hospital records was apparently admitted as the prosecutor's Exhibit No. 7 and that defense counsel questioned the nurse witness about the complainant's clinical depression diagnosis and history of attempted suicide. The defense made no offer of proof with regard to a different diagnosis. See MRE 103(a)(2). We remand this case to the Court of Appeals for consideration of the issues raised by the defendant but not addressed by that court during its initial review of this case. Court of Appeals No. 272019.

KELLY, J. I would deny leave to appeal.

PEOPLE v COLBERT, No. 136886. In lieu of granting leave to appeal, we reverse that portion of the Court of Appeals opinion and the accompanying order remanding this case to the Macomb Circuit Court for further proceedings, for the reasons stated in the Court of Appeals dissenting opinion. Court of Appeals No. 277621.

KELLY, J. I would deny leave to appeal.

Leave to Appeal Denied September 24, 2008:

PEOPLE v WILBURN, No. 133070; Court of Appeals No. 274442.

PEOPLE v DRUMMOND, No. 136227; Court of Appeals No. 282493.

KRASTES v HASELEY CONSTRUCTION COMPANY, INC, No. 136405; Court of Appeals No. 276545.

KELLY, J. I would grant leave to appeal.

Summary Dispositions September 26, 2008:

BESSINGER v OUR LADY OF GOOD COUNSEL, No. 128870. By order of January 31, 2006, this case was remanded to the Workers' Compensation

Appellate Commission for a supplemental opinion. On order of the Court, the opinion having been received, the application for leave to appeal the April 29, 2005, order of the Court of Appeals is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the prior decisions of the workers' compensation tribunals and we remand this case to the Board of Magistrates for a new hearing and a decision consistent with this Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266 (2008). The plaintiff's current entitlement to benefits shall continue until a new decision is issued by the board. We do not retain jurisdiction. Court of Appeals No. 259974.

WEAVER, J. (*dissenting*). I dissent from the order vacating the decisions of the workers' compensation tribunals and remanding this case to the Board of Magistrates for a new hearing and decision consistent with this Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes v Chrysler LLC,* I vote to grant leave to appeal in this case to consider whether a majority of this Court reached the correct decision in *Stokes*.

KELLY, J. I would deny leave to appeal.

DIOT v DEPARTMENT OF CORRECTIONS, No. 130702. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the prior decisions of the workers' compensation tribunals and we remand this case to the Board of Magistrates for a new hearing regarding the plaintiff's entitlement to workers' compensation benefits for the closed period from July 17, 2002, to March 25, 2003, consistent with this Court's decisions in *Stokes v Chrysler LLC,* 481 Mich 266 (2008), and *Robertson v DaimlerChrysler Corp,* 465 Mich 732 (2002). We do not retain jurisdiction. Court of Appeals No. 264781.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order vacating in part the decisions of the workers' compensation tribunals and remanding this case to the Board of Magistrates for a new hearing regarding the plaintiff's entitlement to workers' compensation benefits for the closed period from July 17, 2002, to March 25, 2003, consistent with this Court's decisions in *Stokes v Chrysler LLC*, 481 Mich 266 (2008), *Robertson v DaimlerChrysler Corp,* 465 Mich 732 (2002), and *Gardner v Van Buren Pub Schools,* 445 Mich 23 (1994).

Because I dissented from the majority opinion in *Stokes v Chrysler LLC,* I vote to grant leave to appeal in this case to consider whether a majority of this Court reached the correct decision in *Stokes*.

ROBERTSON v DAIMLERCHRYSLER CORPORATION, No. 134805. The motion for leave to file a brief amicus curiae is granted. The application for leave to appeal the July 26, 2007, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals opinion in part with regard to its application of *Sington v Chrysler Corp*, 467 Mich 144 (2002), and the Workers' Compensation Appellate Commission's determination that *Sington* is inapplicable to this case, and we remand this case to the Board of Magistrates for further proceedings regarding disability consistent with the standards set forth in *Stokes v Chrysler LLC*, 481 Mich 266

(2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 263067.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order partially vacating the Court of Appeals judgment with regard to its application of *Sington v Chrysler Corp,* 467 Mich 144 (2002), and the Workers' Compensation Appellate Commission's determination that *Sington* is inapplicable to this case, and remanding this case to the magistrate for further proceedings regarding disability consistent with the standards set forth in *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes v Chrysler LLC,* I vote to grant leave to appeal in this case to consider whether a majority of this Court reached the correct decision in *Stokes*.

BECKES V DETROIT DIESEL CORPORATION, No. 135594. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals opinion in part with regard to its application of *Sington v Chrysler Corp*, 467 Mich 144 (2002), and the Workers' Compensation Appellate Commission's determination that *Sington* is inapplicable, and we remand this case to the Board of Magistrates for further proceedings regarding disability consistent with the standards set forth in *Stokes v Chrysler LLC*, 481 Mich 266 (2008). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 270791.

MARKMAN, J. (*concurring*). I concur in this Court's order vacating the Court of Appeals opinion in part and remanding to the magistrate in light of *Stokes v Chrysler LLC,* 481 Mich 266 (2008). I write separately only to reaffirm what I stated in *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197 (2007) (MARKMAN, J., concurring), in response to the incessant criticisms of the dissenting justices concerning the majority justices' alleged lack of regard for precedent. See, e.g., *Rowland, supra* at 257 n 13 (KELLY, J., dissenting). As I observed in *Rowland,* that the majority justices have overruled precedent more often than the dissenting justices is less a function of the former respecting precedent any less than the latter, than it is a function of the reality that the dissenting justices, unlike the majority justices, believe that these precedents were rightly decided. This point is once again reinforced by what the dissenting justices are doing in the instant case, as well as in *Bessinger v Our Lady of Good Counsel*, 482 Mich 996 (2008); *Diot v Dep't of Corrections*, 482 Mich 997 (2008); *Kohler v Mercy Mem Hosp Corp*, 482 Mich 999 (2008); *Malloy v DSI Acoustical Co*, 482 Mich 986 (2008); *Robertson v Daimler-Chrysler Corp*), 482 Mich 997 (2008); *Innes v Allied Automotive Group, Inc*, 482 Mich 970 (2008); and *Jones v Comerica, Inc*, 482 Mich 890 (2008).

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order partially vacating the Court of Appeals judgment with regard to *Sington v Chrysler Corp,* 467

Mich 144 (2002), and the Workers' Compensation Appellate Commission's determination that *Sington* is inapplicable, and remanding this case to the magistrate for further proceedings regarding disability consistent with the standards set forth in *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in this Court's decision in *Stokes v Chrysler LLC,* I vote to grant leave to appeal in this case to consider whether a majority of this Court reached the correct decision in *Stokes*.

KOHLER V MERCY MEMORIAL HOSPITAL CORPORATION, No. 135949. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the prior decisions of the workers' compensation tribunals and we remand this case to the Board of Magistrates for a new hearing and a decision consistent with this Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266 (2008). The plaintiff's current entitlement to benefits shall continue until a new decision is issued by the board. We do not retain jurisdiction. Court of Appeals No. 278363.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order vacating the decisions of the workers' compensation tribunals and remanding this case to the Board of Magistrates for a new hearing and a decision consistent with this Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes v Chrysler LLC,* I vote to grant leave to appeal in this case to consider whether a majority of this Court reached the correct decision in *Stokes*.

ACEMCO, INCORPORATED V RYERSON TULL COIL PROCESSING, No. 136203. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The parties' Supply Agreement unambiguously provides a quantity term by stating that the total purchase volume "will be . . . 33,950,000 pounds . . . plus or minus 20%." We remand this case to the Muskegon Circuit Court for reinstatement of the July 31, 2006, order denying the defendant's motion for summary disposition and for further proceedings consistent with this decision. Court of Appeals No. 272491.

KELLY, J. (*concurring in part and dissenting in part*). I agree with the decision to reverse the judgment of the Court of Appeals and remand this case to the trial court.

Paragraph one of the parties' supply agreement provides that "Buyer agrees to buy from Seller such quantities of [steel products] as the Buyer may specify in its purchase orders, the estimated volume of which will be a total of 33,950,000 pounds for all of the products, plus or minus 20%, over the term of the Agreement." This language could be interpreted to mean that the plaintiff is not entitled to buy any steel products whatsoever from the defendant. But it is equally possible to interpret this clause to mean that the plaintiff had an obligation to purchase at least 27,170,000 (33,050,000 minus 20 percent) pounds of steel products over the course of the contract. Hence, the contract language is ambiguous.

Once a quantity term appears in a writing that is claimed to represent a contract for the sale of goods, parol evidence may be considered to

resolve ambiguities. *In re Frost Estate*, 130 Mich App 556, 559 (1983). It is the jury that must decide what quantity, if any, the supply agreement specified in this case. *Great Northern Packaging, Inc v General Tire & Rubber Co*, 154 Mich App 777, 787 (1987). For that reason, the case should be remanded to the Muskegon Circuit Court for reinstatement of the July 31, 2006, order denying defendant's motion for summary disposition.

PEOPLE V BAISDEN, No. 136321. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in part. We agree with the trial court that MCL 750.520b(1)(f)(iv) is applicable here and that it is common knowledge that penile penetration constitutes an unethical and unacceptable method of "medical treatment." Therefore, we overrule *People v Capriccioso*, 207 Mich App 100, 105 (1994), and *People v Thangavelu*, 96 Mich App 442, 450 (1980), to the extent that they state or hold that medical testimony is required in all prosecutions under MCL 750.520b(1)(f)(iv). We further overrule those cases to the extent that they limit the application of the statute to situations in which the medical examination or treatment is used as a pretext to secure a patient's consent to sexual conduct. That limited interpretation does not comport with the plain language of the statute. The statute also applies to situations where nonconsensual sexual conduct is perpetrated during or in the context of medical treatment or examination. In a separate order, we are vacating the portion of the judgment of the Court of Appeals in *People v Bayer*, 279 Mich App 49 (2008), that states that medical testimony is required in all prosecutions under MCL 750.520b(1)(f)(iv).

The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. We remand this case to the Court of Appeals for consideration of the defendant's remaining issues. Court of Appeals No. 269999.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE V BAYER, No. 136820. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the portion of the judgment of the Court of Appeals that states that medical testimony is required in all prosecutions under MCL 750.520b(1)(f)(iv). *People v Baisden,* 482 Mich 1000 (2008). In all other respects, the application is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 279 Mich App 49.

Leave to Appeal Denied September 26, 2008:

PEOPLE V DOZIER, No. 136204; Court of Appeals No. 275687.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I would grant leave to appeal the March 25, 2008, judgment of the Court of Appeals to consider whether defendant was deprived of a fair trial by the prosecution's violation of MCR

6.201(B)(3). The prosecution violated the rule by failing to disclose defendant's July 26, 2006, statement to the defense until it was used to impeach him during cross-examination at trial. The record suggests that the statement was obtained in violation of defendant's Sixth Amendment right to counsel because counsel was not present when the statement was made. Also, there is no evidence of a valid waiver of counsel's presence, even though defendant had been arraigned and counsel had been appointed when the statement was obtained. It therefore appears that the prosecution's belated disclosure of the post-arraignment statement deprived defendant of a fair trial.

In re SMITH (DEPARTMENT OF HUMAN SERVICES V SMITH), No. 137288; Court of Appeals No. 283285.

In re WADE (DEPARTMENT OF HUMAN SERVICES V WADE), No. 137290; Court of Appeals No. 283902.

Rehearings Denied September 26, 2008:

BRACKETT V FOCUS HOPE, INC, No. 135375. Opinion reported at 482 Mich 269. Court of Appeals No. 274078.

CAVANAGH, J. (*dissenting*). I would grant rehearing and, on rehearing, would reverse this Court's July 30, 2008, decision because defendant has failed to offer any evidence that the work rule in question had been enforced. When seeking to avoid paying workers' compensation benefits to an employee because the employee violated a work rule, the employer has the burden of proving that the work rule was "rigidly enforced." *Allen v Nat'l Twist Drill & Tool Co*, 324 Mich 660, 664 (1949). Although defendant showed that employees knew that the work rule was considered mandatory, defendant entirely failed to show any occurrence of actual enforcement of the rule except against plaintiff. Thus, defendant has failed to establish a defense under MCL 418.305.

KELLY, J. I join the statement of Justice CAVANAGH.

WEAVER, J. (*dissenting*). I dissent from the order denying plaintiff's motion for rehearing. I would grant rehearing for the reasons stated in my statement dissenting from the decision of the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) to reverse the judgment of the Court of Appeals on the ground that the plaintiff's refusal to attend a mandatory employee event constituted "intentional and wilful misconduct" under MCL 418.305, thereby barring her recovery of benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*.

For my reasons in detail, see my dissenting opinion in *Brackett v Focus: Hope,* 482 Mich 269, 286 (2008).

BOODT V BORGESS MEDICAL CENTER, No. 132688. Opinion reported at 481 Mich 558. Reported below: 272 Mich App 621.

MARKMAN, J. (*concurring*). Although I am heartened by Justice CAVANAGH's newly found receptivity to "textualism," he has, I fear, a ways to go before he fully gets the hang of it. For starters, a more

seasoned "textualist" would not have overlooked the language of MCL 600.2912b(1), which states that a person "*shall not commence* an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." (Emphasis added.) Nor would a more seasoned "textualist" have overlooked the language of MCL 600.2912b(4), which states that the "notice given to a health professional or health facility under this section *shall* contain a statement of at least *all* of the following . . . ." (Emphasis added.) Thus, a more seasoned "textualist" likely would have concluded that a plaintiff cannot commence an action before he or she has filed a notice of intent that contains "all" the information required under § 2912b(4), and until this is done, he or she cannot file a complaint tolling the period of limitations. Moreover, such a "textualist" would also have recognized that more specific statutory provisions control over more general statutory provisions, and thus the specific requirements of § 2912b(1) regarding "commenc[ing] an action alleging medical malpractice" prevail over the general requirements of MCL 600.1901 regarding the commencing of civil actions. Such an analysis admittedly would be partially premised upon the plain language of the law, partially upon logic, and partially upon rules of interpretation dating back several centuries, but, of course, no one who is not intent on caricaturing "textualism" would doubt that all three of these considerations are among the tools of a "textualist."[1] I fully concur in this Court's order.

CAVANAGH, J. (*dissenting*). This Court's opinion of July 2, 2008, should be reconsidered and vacated. Plaintiff argued that her notice was not deficient, but, even if it was, this case should be dismissed without prejudice. Plaintiff further argued that a refiled action would be timely because the limitations period would have been tolled during the pendency of the case. I agree.

The majority stated that "[t]his Court has already held that a defective notice of intent does not toll the period of limitations," citing *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64 (2002) (*Roberts I*). *Boodt v Borgess Med Ctr*, 481 Mich 558, 561 (2008). But *Roberts I* is not applicable here. The applicable tolling statute in that case was MCL 600.5856(d), which stated, at the time, that presuit notice would give rise to tolling if that notice "is given in compliance with [MCL 600.2912b]." The statute in this case is § 5856(a), which, at the time this case was filed, did not expressly require compliance with § 2912b. Rather, the statute simply stated: "The statutes of limitations or repose are tolled: (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant." MCL 600.5856(a). The language of § 5856(a) is

[1] If by reference to a "Pavlovian concurrence" my dissenting colleague intends to characterize this statement as a predictable and expected response to a judicial display of disregard for the language of a statute, then I suppose that his is an accurate characterization.

unequivocal: the period of limitations is tolled when a complaint is filed and service is effectuated. Section 5856(a) says nothing about compliance with the notice-of-intent statute.

Justice MARKMAN's Pavlovian concurrence misses the point. The issue here is tolling. The most specific statute on this issue is § 5856, the tolling statute. The applicable section of the statute, § 5856(a), does not require compliance with § 2912b. Former § 5856(d), the statute at issue in *Roberts I*, did require compliance with § 2912b, but § 5856(d) applies "[i]f, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose . . . ." That is not the case here. Plaintiff timely filed her notice of intent and her complaint.[2] Thus, § 5856(a) applies and the period of limitations for plaintiff's action was tolled when she filed her complaint and a copy of the summons and complaint was served on defendant.

Call me a textualist if you will, but I believe this Court should hold to its policy of strict application of statutes. This Court's ruling in this case violates that policy by adding words to the statute requiring compliance with § 2912b. Section 2912b is not a tolling statute. It says nothing about whether a period of limitations has or has not been tolled. To suggest that it does adds language to the statute. Further, the majority in this case determined that this case was never "commenced" because plaintiff failed to comply with § 2912b. But § 2912b does not dictate when an action is commenced. The statute that controls "commencement" is MCL 600.1901, which states that "[a] civil action is commenced by filing a complaint with the court."

This Court's ruling is also contrary to its reasoning in *Costa v Community Emergency Med Services, Inc,* 475 Mich 403 (2006). In that case, the defendants were governmental agencies that failed to file an affidavit of meritorious defense, as required by MCL 600.2912e(1) (which states that a defendant "shall" file such an affidavit). A majority of this Court observed that MCL 691.1407(2) states that a governmental employee *is* immune from tort liability. The majority concluded that § 1407(2) and MCL 600.2912e(1) were "equally mandatory," but MCL 691.1407(2) trumped on the basis of the verb "to be"—"a governmental employee *is* immune." Likewise, in this case, MCL 600.1901 states that a civil action *is* commenced when the complaint is filed and served on the defendant. Section 5856(a) states that periods of limitations *are* tolled under circumstances such as those in this case. This Court should act consistently with the reasoning of *Costa* and hold that the limitations period in this case was tolled when plaintiff filed her complaint and served summons on defendant.

Finally, it is clear that the notice-of-intent statute was enacted to eliminate litigation by encouraging settlement in the presuit period. This Court's ruling will work contrary to that intent; defendants will have no incentive to negotiate before litigation because there is always the prospect that plaintiffs' cases will be precluded by a technical error that cannot be corrected because of the running of the period of limitations. I

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[2] This is the critical factual distinction between this case and *Roberts I*.

see no logic in the majority's result that ignores the plain language MCL 600.5856(a), defeats the purpose of MCL 600.2912b, and forecloses meritorious cases without remedy on the basis of a statute that is clearly intended to apply only at the presuit stage.

WEAVER, J. I would grant rehearing.

KELLY, J. I would grant rehearing and would reverse this Court's opinion of July 2, 2008.

DAIMLERCHRYSLER CORPORATION v STATE TAX COMMISSION, No. 133394. Opinion reported at 482 Mich 220. Court of Appeals No. 267565.

WEAVER, CORRIGAN, and MARKMAN, JJ. We would grant rehearing and affirm the Court of Appeals.

FORD MOTOR COMPANY v STATE TAX COMMISSION, No. 133396. Opinion reported at 482 Mich 220. Court of Appeals No. 262500.

WEAVER, CORRIGAN, and MARKMAN, JJ. We would grant rehearing and affirm the Court of Appeals.

Appeals Dismissed September 26, 2008:

VILLAGE OF NORTHPORT v SCOTT, No. 136451. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 282474.

VILLAGE OF NORTHPORT v BUSBY, VILLAGE OF NORTHPORT v CANN, VILLAGE OF NORTHPORT v DAVIS, VILLAGE OF NORTHPORT v FUNK, VILLAGE OF NORTHPORT v TAYLOR, and VILLAGE OF NORTHPORT v WEBER, Nos. 136453, 136454, 136455, 136456, 136457, and 136458. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals Nos. 282475, 282476, 282477, 282478, 282479, and 282480.

Leave to Appeal Granted October 1, 2008:

POTTER v MCLEARY, No. 136336. On order of the Court, the application for leave to appeal the March 20, 2008, judgment of the Court of Appeals is considered and, it is granted, limited to the issue whether defendant Huron Valley Radiology, P.C., is a "health facility or agency" to which a plaintiff is required to provide notice under MCL 600.2912b(1). See MCL 333.20106(1).

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., Michigan Health and Hospital Association, and Citizens for Better Care are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 278 Mich App 279.

Summary Dispositions October 1, 2008:

LIGONS v CRITTENTON HOSPITAL, No. 135903. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 278622.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. I would deny leave to appeal because I am not persuaded that the questions presented should be reviewed by this Court.

LOFTON v AUTOZONE, INC, No. 136029. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the decision of the Workers' Compensation Appellate Commission mailed April 4, 2007, and we remand this case to the Board of Magistrates for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). If it is found that the plaintiff is disabled under MCL 418.301(4), but that the limitation of wage-earning capacity is only partial, the magistrate shall compute wage-loss benefits under MCL 418.361(1) on the basis of what the plaintiff remains capable of earning. The magistrate assigned to this case may take additional proofs upon request of either party. We direct the magistrate to issue a decision and file that decision with the Clerk of this Court within 126 days of the date of this order. We retain jurisdiction. Court of Appeals No. 277845.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order vacating the decision of the Workers' Compensation Appellate Commission and remanding this case to the Board of Magistrates for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes v Chrysler LLC,* 481 Mich at 320 (WEAVER, J., dissenting), I vote to grant leave to appeal in this case to consider whether a majority of this Court reached the correct decision in *Stokes*.

KELLY, J. I would grant leave to appeal to reconsider *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

GATES v USA JET AIRLINES, INC, No. 136097. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we vacate the arbitration award in this case, for the reasons stated in the Court of Appeals dissenting opinion. *Hewitt v Village of Reed City,* 124 Mich 6, 8-9 (1900). We remand this case to the Wayne Circuit Court for further proceedings consistent with this order. Court of Appeals No. 272860.

CORRIGAN, J. I would refer attorney Paul J. Dillon to the Attorney Grievance Commission. Mr. Dillon's submission to the arbitration panel of an ex parte supplemental brief in contravention of the rules governing the arbitration may have violated MRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and 3.5(b) (prohibiting ex parte communication with a judge, juror, prospective juror, or other official regarding a pending matter).

KNIGHT ENTERPRISES, INC v FAIRLANE CAR WASH, INC, No. 136787. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the April 8, 2008, judgment of the Court of Appeals. Paragraph 8 of the Credit Card Participating Agreement limits defendants' liability to "service charges assessed by CITGO/KNIGHT on credit card sales tickets [defendants] submit . . . ." No provision imposes liability for credit card sales tickets submitted by other parties. The trial court and the Court of Appeals interpreted paragraph 12 of that agreement, which provides that "[defendants] will be billed on a monthly basis per month for . . . all credit card fees," as requiring that defendants pay service charges regardless of whether they were for credit card sales tickets that defendants submitted. Thus, neither court considered whether the credit card fees at issue were comprised of service charges only for credit card sales tickets that defendants submitted. The lower courts' interpretation of paragraph 12 renders paragraph 8's limitation surplusage or nugatory. "[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468 (2003) (citations omitted). Interpreting paragraph 12 to provide that defendants will be billed monthly only for service charges for which they are liable under paragraph 8 gives effect to both paragraphs 8 and 12. We remand this case to the Wayne Circuit Court for further proceedings to determine what portion of the credit card fees at issue constituted service charges on credit card sales tickets that defendants submitted. On the basis of that determination, the circuit court shall reconsider plaintiff's request for case evaluation sanctions. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 276838.

CAVANAGH, J., did not participate because of a familial relationship with counsel of record.

Leave to Appeal Denied October 1, 2008:

KWASNIEWSKI v HARRINGTON, No. 135240; Court of Appeals No. 268774.

CAVANAGH, WEAVER, and KELLY, JJ. We would reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

PEOPLE v LYNCH, No. 135914. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 283180.

PEOPLE v COLLINS, No. 136123. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279645.

KELLY, J. I would grant leave to appeal.

PEOPLE v TIMOTHY HOLLAND, No. 136263; Court of Appeals No. 281978.

PEOPLE v DONALD, No. 136575; Court of Appeals No. 275688.

PEOPLE v SPRAGUE, No. 136647; Court of Appeals No. 278007.
KELLY, J. I would grant leave to appeal.

PEOPLE v HOLM, No. 136754; Court of Appeals No. 279406.

Leave to Appeal Granted October 3, 2008:

PEOPLE v JEREMY FISHER, No. 136591. On order of the Court, the application for leave to appeal the March 25, 2008, judgment of the Court of Appeals is considered, and it is granted. In addition to the issues presented in the application for leave to appeal concerning whether the emergency aid doctrine justified the warrantless entry into the defendant's home, and whether evidence of an assault against the police may be suppressed irrespective of the validity of a warrantless entry into a house, the parties shall address the standard of review to be applied for appellate review of a trial court's decision concerning an alleged Fourth Amendment violation for entering a house without a warrant, considering *United States v Gambino-Zavala*, 539 F3d 1221, 1225 (CA 10, 2008), quoting *United States v Apperson*, 441 F3d 1162, 1184 (CA 10, 2006), and *Ornelas v United States*, 517 US 690 (1996).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 276439.

Summary Dispositions October 3, 2008:

YOUNG v NANDI, No. 134799. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate only that part of the Court of Appeals judgment that held that the trial court properly denied defendants' request for a hearing concerning attorney fees in plaintiff's favor as case evaluation sanctions under MCR 2.403(O)(6)(b). Under the facts of this case, such a hearing was necessary. We remand this case to the Oakland Circuit Court for a hearing on the subject of a reasonable attorney fee, consistent with *Smith v Khouri*, 481 Mich 519 (2008). In all other respects, the application for leave to appeal as cross-appellants is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Reported below: 276 Mich App 67.

CORRIGAN, J. (*concurring*). I concur in all respects in the Court's order denying leave to appeal and remanding the case for an evidentiary hearing on the attorney fee award. I specifically concur in the denial of plaintiff's application for leave to appeal because the Court of Appeals correctly held that the higher noneconomic damages cap found in MCL 600.1483(1) does not apply to plaintiff's wrongful death action. I disagree, however, with the basis for the Court of Appeals holding. The Court of Appeals held that while the higher noneconomic damages cap may apply

to wrongful death actions, in this case plaintiff failed to satisfy the statutory requirements for application of the higher cap.

I continue to adhere to the principles cited in my partial dissenting opinion in *Shinholster v Annapolis Hosp*, 471 Mich 540, 582-597 (2004), that the plain language of MCL 600.1483(1) prohibits the application of the higher noneconomic damages cap to all wrongful death actions.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

MOSBY V HART & COOLEY MANUFACTURING, INC, No. 134845. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the decision of the Workers' Compensation Appellate Commission (WCAC) mailed January 24, 2007, which determined that the plaintiff has established a compensable disability within the meaning of *Sington v Chrysler Corp,* 467 Mich 144 (2002), and we remand this case to the WCAC for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). The WCAC may remand this case to the Board of Magistrates for the taking of additional proofs and for further findings upon the request of a party. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 276313.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the Workers' Compensation Appellate Commission for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes,* I would grant leave to appeal in this case to consider whether the *Stokes* majority reached the correct decision.

KELLY, J. I join the statement of Justice WEAVER.

MARTIN V EATON CORPORATION, No. 134950. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). Court of Appeals No. 276134.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the Court of Appeals as on leave granted for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes,* I would grant leave to appeal in this case to consider whether the *Stokes* majority reached the correct decision.

KELLY, J. I join the statement of Justice WEAVER.

KENNEY V ALTICOR, INCORPORATED, No. 135305. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). Court of Appeals No. 278090.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the Court of Appeals as on leave granted for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes,* I would grant leave to appeal in this case to consider whether the *Stokes* majority reached the correct decision.

KELLY, J. I join the statement of Justice WEAVER.

KRUSE v CORT FURNITURE RENTAL, No. 136471. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Workers' Compensation Appellate Commission (WCAC) for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). The WCAC may remand this case to the Board of Magistrates for the taking of additional proofs and for further findings upon the request of a party. We do not retain jurisdiction. Court of Appeals No. 281910.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the Workers' Compensation Appellate Commission for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Because I dissented from the majority opinion in *Stokes,* I would grant leave to appeal in this case to consider whether the *Stokes* majority reached the correct decision.

KELLY, J. I join the statement of Justice WEAVER.

DEPARTMENT OF ENVIRONMENTAL QUALITY v REXAIR, INC, No. 136700. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the August 7, 2006, order of the Ingham Circuit Court. The Court of Appeals erred by holding that the circuit court lacked the inherent authority, as well as the authority under the consent judgment, the Michigan Rules of Court, and MCL 600.611, to dismiss with prejudice the dispute resolution proceeding initiated by plaintiff and to award defendant costs and attorney fees. The Court of Appeals further erred by disregarding the undisputed facts in the record that supported the circuit court's findings and by failing to accord the proper deference to the circuit court's determination that the plaintiff had invoked the circuit court's jurisdiction for an improper purpose and abused the dispute resolution process. *Maldonado v Ford Motor Co,* 476 Mich 372, 376 (2006). Court of Appeals No. 272652.

CAVANAGH and KELLY, JJ. We concur in the result.

WEAVER, J. (*concurring in the result only*). I concur only with the decision to reverse the judgment of the Court of Appeals and reinstate the August 7, 2006, order of the Ingham Circuit Court.

In *Maldonado v Ford Motor Co*, 476 Mich 372, 426-435 (WEAVER, J., *dissenting,*), I disagreed with the majority opinion for the reasons stated in my dissent. Therefore, I find the citation to *Maldonado* in this order to be unnecessary.

Leave to Appeal Denied October 3, 2008:

HANSEN v DEPARTMENT OF COMMUNITY HEALTH, No. 136283; Court of Appeals No. 278074.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would reverse in part the judgment of the Court of Appeals and remand this case to the trial court for an evidentiary hearing concerning the appropriate amount of sanctions with respect to Counts I and II only. In my judgment, sanctions for Count III were inappropriate because that count was not barred by the statute of limitations and plaintiff's legal position on this count was not "devoid of arguable legal merit." MCL 600.2591(3)(a)(*iii*).

YOUNG, J. I join the statement of Justice MARKMAN.

PEOPLE v RUSSELL WILLIS, No. 136380; Court of Appeals No. 283801.

CORRIGAN, J., (*dissenting*). I would remand this case to the Court of Appeals for consideration as on leave granted for a more thorough analysis. The panel disposed of the case in an order that affords no guidance to trial courts concerning the panel's reasoning. The order, providing no reasoning whatsoever, merely remands the case to the trial court "to afford defendant an opportunity to withdraw his plea or for the trial court to impose a two-year minimum sentence in accordance with *People v Cobbs,* 443 Mich 276; 505 NW2d 208 (1993)." Unpublished amended order of the Court of Appeals, entered May 1, 2008 (Docket No. 283801).

The defendant pleaded no contest to the charges against him and received a sentence evaluation from the trial judge as provided in *Cobbs*. The defendant failed to appear for the subsequent sentencing hearing, however, and was later arrested pursuant to a bench warrant. Upon finally sentencing him, the court declined to give him the benefit of the *Cobbs* evaluation and imposed a higher minimum sentence within the minimum guidelines range prescribed by statute. The court denied the defendant's request to withdraw his plea, concluding that withdrawal was not warranted in light of the defendant's misconduct. In rendering its decision, the trial court specifically relied on *People v Garvin,* 159 Mich App 38 (1987). The Court of Appeals reversed, presumably citing *Cobbs* for the general proposition that a defendant who pleads guilty or no contest in reliance on a sentence evaluation has an "absolute right" to withdraw the plea if the judge later concludes that the sentence should exceed the preliminary evaluation. See *Cobbs, supra* at 283.

But the trial court here reasonably posited that a defendant forfeits his right to withdraw if he absconds from sentencing. The panel did not discuss the precedent cited by the trial judge and the prosecutor, in which appellate courts declined to permit plea withdrawal under similar factual circumstances. See *People v Kean,* 204 Mich App 533, 536 (1994) (By walking away from a treatment program specified in the plea deal and then absconding, the "defendant had violated the plea agreement and, consequently, . . . he was not entitled to the benefit of the bargain."); *Garvin, supra* at 43 (the defendant "implicitly waived" the right to withdraw his plea by escaping from custody and failing to appear for sentencing); *People v Acosta,* 143 Mich App 95, 99 (1985) (A defendant may not benefit from a plea bargain "irrespective of [his] bad faith in failing to comply with the bargain by failing to appear."). Although these

cases did not involve *Cobbs* pleas, the prosecutor reasonably argues that their rationale extends to cases involving *Cobbs* pleas.

Further, allowing withdrawal under these circumstances permits a defendant to manipulate the proceedings and benefit from his misconduct. Indeed, it may encourage misconduct. A defendant who becomes dissatisfied with a *Cobbs* evaluation may abscond in order to induce the judge to impose a higher sentence and then take advantage of the right to withdraw. Moreover, under the Court of Appeals ruling in this case, a defendant may apparently abscond from custody for as long as he wishes but then still benefit from the plea deal. This Court explicitly prohibits a defendant from "assert[ing] 'rights' that came into existence because of his own misconduct." *People v Washington,* 461 Mich 294, 299-300 (1999) (A defendant could not claim violation of his Double Jeopardy rights because "[i]f he had not breached his agreement to return to court for sentencing, there would have been no possibility of a violation . . . .").

PEOPLE V JERRELL FOX, No. 136517; Court of Appeals No. 277140.

WEAVER, J. I would grant leave to appeal.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal. I question the Court of Appeals determination that the trial court's error in convicting defendant of the cognate lesser offense of felonious assault, MCL 750.82, requires vacation of his convictions and sentences. The prosecutor argues convincingly that defense counsel at trial acquiesced in the consideration of the cognate offense, thereby extinguishing the error. See *People v Carter*, 462 Mich 206, 215 (2000).

Defendant was charged with eight counts of assault with intent to commit murder, MCL 750.83. At defendant's bench trial, the prosecutor conceded that the evidence did not show an intent to commit murder and asked the court to consider the lesser offenses of assault with intent to do great bodily harm, MCL 750.84, and felonious assault. Defense counsel argued that the evidence did not show an intent to commit murder or to do great bodily harm and then stated, "I don't really want to concede on the lesser of Felonious Assault. However, I think certainly there was no intent to do any great bodily harm to anyone by Mr. Fox." Defense counsel then concluded, "I think that this is not a case of Assault With Intent to do—to Commit Murder or to do Great Bodily Harm. I would ask the court to find the appropriate sentence—appropriate verdict."

The trial court found defendant guilty of three counts of felonious assault. The Court of Appeals vacated the convictions on the ground that felonious assault is a cognate lesser offense of assault with intent to commit murder. See *People v Cornell*, 466 Mich 335, 357 (2002) (holding that MCL 768.32[1] does not permit consideration of cognate lesser offenses), and *People v Otterbridge*, 477 Mich 875 (2006) (holding that felonious assault is a cognate lesser offense of assault with intent to commit murder).

Nevertheless, I agree with the prosecutor that defense counsel's comments reflect his acquiescence in the consideration of felonious assault. Counsel's assertion that he did not "really want to concede on the lesser of Felonious Assault" was a declination to concede defendant's *guilt* of that offense. Counsel left open the possibility that the court could

consider a felonious assault conviction by stating, "I think that this is not a case of Assault with Intent to do—to Commit Murder or to do Great Bodily Harm. I would ask the court to find the appropriate sentence—appropriate verdict." By acquiescing in the *consideration* of felonious assault, defendant waived this issue, thereby extinguishing the error. See *Carter*, *supra* (explaining that waiver is the intentional relinquishment or abandonment of a known right, and that it extinguishes any error).

Even if the error was not waived, defendant failed to object to the consideration of felonious assault. In light of this forfeiture, defendant must establish a plain error that affected the outcome of the lower court proceedings. He must show that he is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764 (1999). Defendant has not met these requirements. "Neither defendant nor the majority has offered any explanation regarding how the defense at trial would have been any different if he had been formally charged with felonious assault." *Otterbridge*, *supra* at 876 (CORRIGAN, J., dissenting).

For these reasons, I would grant leave to appeal to consider more fully the prosecutor's arguments in this case.

SINICROPI V MUZUREK, Nos. 137061 and 137077; Reported below: 279 Mich App 455.

CAVANAGH, J. I would grant leave to appeal to address the constitutional due process issues related to the rights of the biological father.

Superintending Control Denied October 3, 2008:

BROOKS V COURT OF APPEALS, No. 137155.

Reconsideration Denied October 8, 2008:

NEAL V DEPARTMENT OF CORRECTIONS, No. 136925. Leave to appeal denied at 482 Mich 984. Court of Appeals No. 285232.

TAYLOR, C.J. did not participate.

Leave to Appeal Denied October 10, 2008:

In re MCCLAIN (CATHOLIC SOCIAL SERVICES OF OAKLAND COUNTY V MCCLAIN-ALLEN), No. 137297; Court of Appeals No. 283151.

Summary Dispositions October 15, 2008:

JOYCE V JOYCE, No. 136786. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 281175.

PEOPLE v WELLMAN, No. 136834. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Clinton Circuit Court for correction of the presentence investigation report as agreed to by the trial court. The circuit court shall forward a copy of the amended report to the Department of Corrections, MCL 771.14(6) and MCR 6.425(E)(2). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 285166.

In re ROBBINS (DEPARTMENT OF HUMAN SERVICES v SANDERS), No. 137249. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the May 1 and August 13, 2008, orders of the Court of Appeals and we remand this case to the Court of Appeals for reinstatement of the respondent-mother's claim of appeal. The record does not demonstrate that the family court substantially complied with the court rules governing termination of the respondent-mother's parental rights and notice of appellate rights. Court of Appeals No. 284790.

Leave to Appeal Denied October 15, 2008:

STANKE v STANKE, No. 136077; Court of Appeals No. 263446.

PEOPLE v NULL, No. 136469; Court of Appeals No. 271597.

PEOPLE v ZAKER, No. 136567; Court of Appeals No. 283719.

PEOPLE v BRIEDENSTEIN, No. 136665; Court of Appeals No. 281647.
KELLY, J. I would grant leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 16, 2008:

CHAMBERS v WAYNE COUNTY AIRPORT AUTHORITY, No. 136900. We direct the clerk to schedule oral argument on December 3, 2008, at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address: (1) whether the plaintiff satisfied the notice requirement of MCL 691.1406, and (2) whether constructive notice may be deemed sufficient, given the statute's lack of a definition of "notice." *Meredith v City of Melvindale*, 381 Mich 572 (1969); *Brown v City of Owosso*, 126 Mich 91 (1901). The parties may file supplemental briefs no later than November 21, 2008. They should not submit mere restatements of their application papers.

The Michigan Association For Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae no later than November 21, 2008. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than November 21, 2008. Court of Appeals No. 277900.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 17, 2008:

BUSH v SHABAHANG, Nos. 136617 and 136983. We direct the clerk to schedule oral argument on November 19, 2008, at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether that portion of the Court of Appeals judgment holding that the direct liability claims against defendants West Michigan Cardiovascular Surgeons and Spectrum Health Butterworth Campus should be dismissed without prejudice is inconsistent with this Court's decision in *Boodt v Borgess Med Ctr*, 481 Mich 558, 563-564 (2008).

We further order that this case be argued and submitted to the Court together with the cases of *Bush v Shabahang*, Docket Nos. 136653 and 136983. The parties may file supplemental briefs no later than November 12, 2008. They should not submit mere restatements of their application papers. Reported below: 278 Mich App 703.

BUSH v SHABAHANG, No. 136653. We direct the clerk to schedule oral argument on November 19, 2008, at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the complaint was filed prematurely.

We further order that this case be argued and submitted to the Court together with the cases of *Bush v Shabahang*, Docket Nos. 136617 and 136983. The parties may file supplemental briefs no later than November 12, 2008. They should not submit mere restatements of their application papers. Reported below: 278 Mich App 703.

SAZIMA v SHEPHERD BAR & RESTAURANT, No. 136940. We direct the clerk to schedule oral argument on November 19, 2008, at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the decision of the Workers' Compensation Appellate Commission is contrary to *Simkins v Gen Motors Corp (After Remand)*, 453 Mich 703, 723 (1996). The parties may file supplemental briefs no later than November 12, 2008, on that issue. They should not submit mere restatements of their application papers. Court of Appeals No. 281855.

Leave to Appeal Granted October 17, 2008:

MCNEIL v CHARLEVOIX COUNTY, No. 134437. The application for leave to appeal the June 5, 2007, judgment of the Court of Appeals is again considered, and it is dismissed as to those plaintiffs who lack standing (Franklin E. Fisher, Kent A. McNeil, and Roger Griffin). The application is granted as to the remaining parties. The parties shall consider: (1) whether the local health department or the county board of commissioners, the entity vested with final authorization of the regulation, MCL 333.2441(1), can create a right or private cause of action against a private entity that alters Michigan's at-will employment doctrine; (2) whether

the right or private cause of action created by Clean Indoor Air Regulation § 1001 falls within the exceptions set forth in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692 (1982), to Michigan's at-will employment doctrine; and (3) whether the exceptions to Michigan's employment at-will doctrine set forth in *Suchodolski* on the basis of "public policy" are consistent with this Court's decision in *Terrien v Zwit*, 467 Mich 56 (2002).

The Clerk of the Court is directed to place this case on the January 2009 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than November 24, 2008, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than December 18, 2008.

The Attorney General, the Michigan Townships Association, the Michigan Association of Counties & Michigan Association for Local Public Health, and Peter C. Venlet, in pro per, are invited to file briefs amicus curiae, to be filed no later than December 30, 2008. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, with such briefs to be filed no later than December 30, 2008.

MARKMAN, J., (*concurring*). I concur in the order granting leave to appeal. However, I would direct the parties to also address the issue whether, under relevant legal and constitutional principles, MCL 333.2441(1) properly delegates authority to Charlevoix County and the Northwest Michigan Community Health Agency to promulgate the regulations at issue in this case. See, e.g., *Taylor v Gate Pharmaceuticals,* 468 Mich 1, 10 n 9 (2003); *Blue Cross & Blue Shield of Michigan v Governor,* 422 Mich 1, 51 (1985).

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. I would deny leave to appeal because I am not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v SWAFFORD, No. 136751. The parties shall address whether the Interstate Agreement on Detainers, MCL 780.601, requires that a detainer be lodged at the institution where the defendant is incarcerated and, if so, whether there was sufficient evidence in this case that the detainer was properly lodged.

The Clerk of the Court is directed to place this case on the January 2009 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 24, 2008, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 18, 2008.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae, to be filed no later than December 30, 2008. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, with such briefs to be filed no later than December 30, 2008. Court of Appeals No. 268499.

Leave to Appeal Denied October 17, 2008:

PEOPLE v WYATT, No. 136379; Court of Appeals No. 284367.

MARKMAN, J. (*concurring*). Defendant pleaded no contest to three counts of first-degree criminal sexual conduct, and the Court of Appeals denied his application for leave to appeal. The dissent concludes that we "should grant leave to appeal to determine whether defendant is entitled to an appeal as of right." However, because defendant has never even attempted to file an appeal as of right, I do not believe this issue is even before this Court. Moreover, even if it is, I do not believe that defendant is entitled to such an appeal. Proposal B, which eliminated appeals of right in plea cases, became effective on December 27, 1994. Defendant's own confession establishes that at least some of his sexual assaults occurred long after this date. Further, the Court of Appeals has already considered the merits of defendant's issues and found them "lack[ing] of merit." Finally, although the prosecutor "begrudgingly" recommended that this Court remand to the Court of Appeals, defendant is not thereby entitled to an appeal of right. For these reasons, I concur in the order denying leave to appeal.

CAVANAGH, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, J. (*dissenting*). The Court should grant leave to appeal to determine whether defendant is entitled to an appeal as of right.

This case involves the effect of Proposal B. In November 1994, the people of Michigan ratified Proposal B, which amended the Michigan Constitution to limit criminal appeals and was intended to reduce the burden imposed by plea-based convictions on the appellate system. Before December 27, 1994, the Michigan Constitution afforded a criminal defendant an appeal as of right from any conviction.[1] After Proposal B passed, a defendant no longer had an appeal as of right if he or she had pleaded guilty or no contest to a criminal charge. Under these circumstances, an appeal could be heard only if the Court of Appeals granted leave to appeal.

In 1999, defendant pleaded no contest to a series of offenses that occurred "on or about" November 1994 through May 1995. He timely requested appellate counsel after his sentencing. Unfortunately for him, a court clerk misfiled his request, and it sat unanswered for 8½ years. The circuit court finally found and acted on the request in 2008.[2]

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[1] Const 1963, art 1, § 20.

[2] Presumably, defendant would have filed an appeal as of right in this case had the court clerk not "lost" his request for the appointment of appellate counsel. As it is, by the time counsel was appointed, defendant no longer had that option. Hence, it is unfair to him for Justice MARKMAN to suggest that, because defendant never attempted to file an appeal as of right, the issue is not before the Court. Had defendant filed an appeal as of right 8½ years after sentencing, the Court of Appeals surely would have denied it out of hand.

The dates of the offenses for which defendant pleaded no contest straddle the cutoff date for appeals of right. It is not clear whether Proposal B applies to offenses that occurred both before and after the December 27, 1994, cutoff date. No caselaw has addressed this issue. Under circumstances such as these, courts traditionally apply the rule of lenity, mitigating the effects of the unclear law.[3] "This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property."[4]

Hence, it appears that defendant in this case may be entitled to an appeal as of right. Both defendant and the prosecutor urge this Court to recognize that right. After the Court of Appeals denied defendant leave to appeal, the prosecutor continued to recommend granting him an appeal as of right, and urged this Court to so rule "to be safe." We should not ignore the prosecutor's admonition for caution. Defendant's plea was for conduct occurring, in part, before the cutoff date of Proposal B. Given the likelihood that Proposal B does not apply in this case, the Court should grant leave to appeal to resolve this question.

Reconsideration Denied October 17, 2008:

WILSON v COMCAST CABLEVISION CORPORATION, No. 136557. Leave to appeal denied at 482 Mich 975. Court of Appeals No. 281228.

Leave to Appeal Dismissed October 17, 2008:

VAN WYNSBERGHE v AMERICAN AXLE & MANUFACTURING HOLDINGS, INC, No. 136515. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 277094.

Leave to Appeal Denied October 22, 2008:

TAYLOR v DEPARTMENT OF CORRECTIONS, No. 136573; Court of Appeals No. 280363.

KELLY, J. I would grant leave to appeal.

PEOPLE v ANTERIO WILLIAMS, No. 136674; Court of Appeals No. 275477.

PEOPLE v HODGES, No. 136687; Court of Appeals No. 282209.

JACKSON-RUFFIN v METRO CARS, INC, No. 136694; Court of Appeals No. 276144.

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[3] See *People v Denio*, 454 Mich 691, 699-700 (1997).

[4] *Huddleston v United States*, 415 US 814, 831 (1974), citing *United States v Wiltberger*, 18 US (5 Wheat) 76, 95 (1820).

PEOPLE v LION, No. 136714; Court of Appeals No. 283883.

MCCORMICK v CARRIER, No. 136738; Court of Appeals No. 275888. CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HADRIAN, No. 136741; Court of Appeals No. 277880.

PEOPLE v SZPYRKA, No. 136749; Court of Appeals No. 284324.

PEOPLE v GRUBBS, No. 136826; Court of Appeals No. 274241.

PEOPLE v CHARLES MATHIS, No. 136844; Court of Appeals No. 275655. KELLY, J. I would grant leave to appeal.

BANE v BANE, No. 137289; Court of Appeals No. 286058.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal October 24, 2008:

ELLIS v FARM BUREAU INSURANCE COMPANY, No. 136069. The motion for leave to file a brief amicus curiae is granted. The motion for reconsideration of this Court's July 25, 2008, order is considered, and it is granted. We vacate our order dated July 25, 2008. On reconsideration, the application for leave to appeal the February 12, 2008, judgment of the Court of Appeals is considered. We direct the clerk to schedule oral argument on December 3, 2008, at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address: (1) whether, under the terms of the insurance policy, the defendant is not liable because, under the facts of this case, the insured premises were vacant or unoccupied for more than 60 consecutive days before the damage occurred; (2) whether the Court of Appeals erred in relying on *Smith v Lumbermen's Mutual Ins Co*, 101 Mich App 78 (1980), because that case did not involve a vacancy of 60 days or more or policy language, such as that here, that limits coverage when the insured premises are vacant or unoccupied for more than 60 consecutive days; and (3) whether, regardless of the contract language, there is merit in the plaintiff's allegation that the Michigan Consumer Protection Act was violated and that the defendant's agent issued the policy despite knowing that the plaintiff planned a period of renovation at the house and, after issuing the policy, the agent never provided the plaintiff with a copy of the policy and then terminated the agency relationship with the defendant. The parties shall file supplemental briefs no later than November 21, 2008. They should not submit mere restatements of their application papers. Court of Appeals No. 275240.

Summary Disposition October 24, 2008:

BOND v COOPER, No. 136802. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for consideration of the

sufficiency of the plaintiff's notice of intent to file suit under MCL 600.2912b(4) and *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008). Court of Appeals No. 273315.

CAVANAGH and WEAVER, JJ. We are not persuaded that the case should be remanded for further proceedings, but we would grant leave to appeal to reconsider *Boodt*, *supra*.

KELLY, J. I would deny leave to appeal.

Leave to Appeal Denied October 24, 2008:

VANCE v HENRY FORD HEALTH SYSTEM, No. 132554; reported below 272 Mich App 426.

MARKMAN, J. (*concurring*). The decedent was seven years old when he died. Plaintiff, the personal representative of the decedent's estate, filed this medical malpractice claim more than two years after the child's death and more than two years after she was appointed as personal representative, but two days before what would have been the decedent's tenth birthday. The trial court denied defendants' motion for summary disposition, but the Court of Appeals reversed on statute of limitations grounds.

MCL 600.5851(1) provides:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

MCL 600.5851(7) provides, in pertinent part:

> [I]f, at the time a claim alleging medical malpractice accrues to a person under [MCL 600.5838a] the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later.

Finally, MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision

> unless the personal representative commences it within 3 years after the period of limitations has run.

The dissent argues that because this is a medical malpractice claim that accrued before the decedent was eight years old, plaintiff had until the decedent's tenth birthday to file suit, pursuant to § 5851(7). I respectfully disagree. Section 5851(1) states that a minor generally "shall have 1 year after the disability is removed through death or otherwise" to file a cause of action. Section 5851(7) then states, however, that if the minor was under the age of eight when the action accrued, he would only have until his tenth birthday to file the action. That is, under § 5851(7), a minor under the age of eight would have to file suit before his tenth birthday; he could not wait until he was 19 to file suit. However, that does not mean that the minor has until his tenth birthday to file suit if the disability has been removed before then. That is, when these provisions are read together, it is clear that regardless of how old the minor was when the action accrued, death removes the age disability, and, thus, pursuant to § 5851(1), the personal representative of the minor's estate must file the action within one year of the minor's death, unless *another* saving provision preserves the action, such as the two-year grace period for personal representatives in MCL 600.5852.[1] However, § 5852 does not preserve this action because the decedent died *after* the period of limitations had run, and § 5852 only applies where the decedent dies *before* the period of limitations has run. For these reasons, I concur in the denial order.[2]

KELLY, J. (*dissenting*.) In this medical malpractice case, plaintiff's decedent, a seven-year-old child, died in one of Henry Ford Health System's hospitals from an alleged morphine overdose. Plaintiff brought

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[1] Such an interpretation is consistent with our decision in *Vega v Lakeland Hospitals*, 479 Mich 243, 250 (2007), in which, we stated:

> MCL 600.5851(1) begins, "Except as otherwise provided in subsection[] (7) . . . ." Contrary to defendants' contention, this language does not mean that if § 5851(7) is applicable, § 5851(1) is not applicable. Instead, it simply means that if § 5851(1) is inconsistent with § 5851(7), § 5851(7) is controlling.

[2] The dissent suggests that this interpretation of the statute, and that of the Court of Appeals, illogically treats surviving children differently than non-surviving children. First, it is, of course, not our place to second-guess the Legislature's logic, or lack thereof, as long as this does not rise to the level of an "absurd result." Second, I am not certain that it is, in fact, illogical to treat surviving children differently than non-surviving children. Perhaps the Legislature wanted to provide a surviving child the possibility of a longer period in which to bring an action simply because the surviving child may be able to reap tangible benefits from a successful action that the non-surviving child cannot.

suit after the expiration of the limitations period and more than two years after being appointed decedent's personal representative, but two days before decedent would have been 10 years old. Defendant moved for summary disposition, claiming that the statutory period of limitations had expired. The trial court denied the motion but the Court of Appeals reversed,[1] relying on its decision in *Vega v Lakeland Hospitals*.[2]

The following year, this Court reversed the Court of Appeals decision in *Vega*,[3] relying on MCL 600.5851.[4] We held that MCL 600.5851 applies to the medical malpractice claims of those under 18 years of age or insane, unless the claim falls under § 5851(7). The first sentence of § 5851(7) creates a different limitations period for children under eight years of age. That sentence did not apply in *Vega,* because the child in that case was 11 years old at the time of the alleged malpractice. Conversely, the first sentence of § 5851(7) does apply in this case because the decedent was under eight years of age. Plaintiff argues that the claim was timely because she filed it on behalf of a child who was injured before the age of eight years and before the child would have reached the age of ten years.

The Court of Appeals interpretation of the statute creates two distinct classes of plaintiffs with differing rights in medical malpractice claims. Under its logic, children under eight years of age injured by medical malpractice are allowed to claim the benefit of § 5851(7), but children of the same age killed by medical malpractice are not. This dichotomy raises a serious question regarding whether the Legislature intended such a curious result.

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[1] *Vance v Henry Ford Health Sys*, 272 Mich App 426 (2006).

[2] *Vega v Lakeland Hospitals*, 267 Mich App 565 (2005).

[3] *Vega v Lakeland Hospitals*, 479 Mich 243 (2007).

[4] MCL 600.5851 provides in pertinent part:

> (1) Except as otherwise provided in subsections (7) and (8), if the person first entitled to . . . bring an action is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have one year after the disability is removed through death or otherwise, to . . . bring the action although the limitations period has run.
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> * * *
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> (7) . . . [I]f at the time a claim alleging malpractice accrues to a person under 5838a, a person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday . . . . If at the time a claim alleging medical malpractice accrues to a person under 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a.

If the decedent in this case had survived, he would have had until his tenth birthday to bring suit. One wonders why the personal representative of the decedent's estate should have less time to bring suit than the child's parent or guardian, had the child survived. Furthermore, this Court's decision in *Vega* did not address what plaintiff argues is the Court of Appeals error in this case, that § 5851(7) does not apply to claimants who fail to survive medical malpractice.

The Court should grant leave to appeal to consider this jurisprudentially significant issue.

MATCZAK v MATCZAK, No. 136322; Court of Appeals No. 278259.

WEAVER, J. I would grant leave to appeal.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal because the Court of Appeals essentially engaged in an improper de novo review of several statutory best interest factors and held that the trial court erred in finding that those factors favored either defendant wife or neither party. In addition, while I agree with the Court of Appeals that this case should be remanded to ensure that the trial court's award of attorney fees to defendant includes only fees directly associated with the divorce case, I do not agree that the trial court abused its discretion in finding that plaintiff husband was capable of paying the attorney fees.

I. FACTS AND PROCEEDINGS

The disputed child custody order in this case was entered following the parties' divorce trial. Before the trial, and around the time plaintiff filed the complaint for divorce, he hid a video camera in the parties' bedroom, apparently because he suspected that defendant was having an affair. The camera caught two incidents of child abuse by defendant. Plaintiff waited to turn the digital video disc over to the Department of Human Service (DHS) child protection authorities until approximately two months later. DHS thereafter took temporary custody of the parties' children and charged defendant with felony child abuse and plaintiff with child neglect because of his delay in reporting the abuse. Both parties pleaded no contest to the charges. After the divorce trial, the trial court awarded sole legal and physical custody of the parties' three children to defendant. The court ruled that each of the statutory best interest factors, MCL 722.23,[1] either favored defendant or the parties equally. It

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[1] MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

also ordered plaintiff to pay defendant $1,412.54 a month in child support, $600 a month in alimony, and to pay $35,000 of defendant wife's attorney fees.[2]

The Court of Appeals vacated the trial court judgment in an unpublished opinion. With respect to the best interest factors, the panel held:

> [W]e are left with the distinct impression that the trial judge routinely engaged in something of a one-sided analysis that favored defendant. The judge consistently and significantly minimized defendant's culpable behavior while highlighting plaintiff's

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(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

[2] Plaintiff earned $64,000 a year compared to defendant's annual salary of $11,000.

> meaningfully less culpable behavior. An objective view of the facts simply does not warrant a finding that defendant should have full physical and legal custody. [*Matczak v Matczak*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2008 (Docket No. 278259), at 3.]

The panel determined that the trial court's findings concerning four of the best interest factors were against the great weight of the evidence, and concluded that the trial court abused its discretion in ruling that defendant was entitled to sole physical and legal custody.

The Court of Appeals also vacated the attorney fee award and remanded for the trial court to (1) "exclude from the attorney fee award any fees not directly associated with the divorce" and (2) "examine plaintiff's expenses to determine whether he is in fact able to bear any portion of defendant's attorney fees." *Matczak*, *supra* at 8. The panel explained that many of the fees were for work associated with the child abuse and neglect case brought by the state, not the divorce case, and that the trial court failed to make the requisite finding that plaintiff was able to bear the expense of defendant wife's attorney fees. *Id*. at 7-8.

II. ANALYSIS

A. CHILD CUSTODY

A trial court's findings in a child custody case are reviewed under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705 (2008). Its findings concerning each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*. A trial court's custody decisions are reviewed for an abuse of discretion. *Id.* Here, although the Court of Appeals recited the correct standard of review, it effectively engaged in a de novo review of the best interest factors. Under the correct standard of review, the Court of Appeals should have affirmed the trial court's findings.

First, the Court of Appeals found that the trial court erred in concluding that factor c (the capacity and disposition of the parties to provide the child with food, clothing, medical care, and other remedial care) favored defendant because it ignored evidence regarding plaintiff's financial and care-giving contributions to the children. The trial court, however, specifically recognized that plaintiff had a higher income than defendant and had made financial contributions to the marriage, but found that the family's financial problems were caused by plaintiff's financial irresponsibility. The record supports the trial court's finding. During the marriage, plaintiff controlled the parties' finances. He purchased the marital home and took out two mortgages on the home. Under his control, the parties also accumulated $55,000 in credit card debt during the marriage. Plaintiff husband went on to accumulate $45,000 more in credit card debt after the complaint for divorce was filed. The trial court noted that plaintiff proposed borrowing more money to

maintain the marital home, while defendant was renting a home, and found defendant's financial plan more reasonable. I think the Court of Appeals erred in rejecting the trial court's ruling that defendant is more fiscally responsible and has a more reasonable financial plan than plaintiff, thus giving her a greater capacity and disposition to provide the children with food, clothing, medical care, and other remedial care. The Court of Appeals erred by overlooking the evidence of plaintiff's financial irresponsibility. Had it not done so, it would have affirmed the trial court's finding.

Second, the Court of Appeals found that the trial court erred in finding that factor f (moral fitness of the parties) did not favor either party. The panel held that this factor should have favored plaintiff because defendant wife had physically abused the children, including two incidents that were caught on camera and resulted in charges of felony child abuse. In so holding, the Court of Appeals ignored other evidence and substituted its own view of the evidence for that of the trial court. Although the trial court did not make specific findings on this factor, the proofs showed that defendant had taken responsibility for her actions and had benefited from therapy following the child abuse incident. Evidence further showed that plaintiff had been physically violent toward defendant. In addition, the trial court noted in discussing another best interest factor that it found plaintiff's use of a hidden camera "unconscionable." It also noted that although plaintiff learned from the video that defendant had been abusing the children, he allowed them to stay in her care until DHS removed them.

Third, the Court of Appeals held that the trial court erred in finding that factor g (mental and physical health of the parties) favored neither party. It found that this factor should have favored plaintiff in light of the testimony of court-ordered psychologist Dr. Vasser that defendant "suffered from histrionic personality disorder with narcissistic and mild borderline features" and his conclusion that defendant "has a problem controlling her anger and would require intensive therapy." *Matczak*, *supra* at 5. Here the Court of Appeals again failed to defer to the trial court's findings of fact and credibility determinations. The trial court acknowledged plaintiff's testimony that defendant had "mental health issues," and that defendant admitted having emotional difficulties. The court, however, credited the testimony of defendant's therapist, who characterized her as having an "adjustment disorder" as a result of the divorce, financial problems, pregnancy, and her son's defiance, but "no ongoing issues." By crediting Dr. Vasser's testimony over the testimony of defendant's therapist, the Court of Appeals essentially made its own credibility findings de novo. The Court of Appeals also ignored testimony from defendant, her therapists, the DHS employee assigned to the case, and others that defendant was not mentally ill.

The Court of Appeals also failed to acknowledge evidence of plaintiff's anger problems. A DHS employee and the child's therapist both characterized plaintiff as "very angry" with defendant. Additionally, the DHS employee testified that plaintiff appeared "emotionally unstable." She testified that plaintiff was "more difficult to deal with" than defendant and was less insightful about his anger problems and the consequences of

his actions. She also testified that defendant wife took responsibility for her actions, whereas plaintiff did not.

Finally, the Court of Appeals held that the trial court erred in finding that factor k (domestic violence) did not favor either party and concluded that this factor should have favored defendant. In so holding, the Court of Appeals stated that "the record . . . reflects that defendant is more inclined to engage in domestic violence than plaintiff." *Matczak*, *supra* at 5. Again, this is error by the Court of Appeals. The incident captured on video does show defendant spanking and slapping one of the children. However, other evidence revealed that plaintiff had repeatedly acted violently toward defendant. In 2000, while defendant was seven months pregnant with the parties' first child, plaintiff became angry with defendant. As she attempted to call for help, plaintiff repeatedly ripped the telephone from her hand. When defendant reached for the kitchen phone, plaintiff pushed her, causing her pregnant belly to strike the kitchen counter. Defendant went into the bedroom to get dressed, but plaintiff repeatedly pushed her onto the bed. Plaintiff fled the house, but the police caught him and took him to jail. Other incidents of plaintiff's violence were also proved. In 2006, while defendant was holding the baby, plaintiff became angry with defendant and grabbed the phone from her hand. The incident prompted defendant to call 911. In other instances, plaintiff, in fits of anger, broke a kitchen drawer and punched holes in the walls. By downplaying these incidents, the Court of Appeals again made its own de novo determination regarding the credibility of the parties and the weight of the evidence.

Because the Court of Appeals inappropriately engaged in de novo review and the findings of the trial court are not against the great weight of the evidence, I would reinstate the trial court's decision.

B. ATTORNEY FEES

MCR 3.206(C)(2)(a) provides that a party requesting attorney fees must allege facts sufficient to show that "the party is unable to bear the expense of the action, and that the other party is able to pay . . . ." It is undisputed that defendant's $11,000 annual salary and $3,000 monthly expenses rendered her unable to bear the expense of the divorce action. The trial court found that plaintiff's $64,000 salary gave him a greater ability to pay the attorney fees in this case. I disagree with the Court of Appeals that the trial court abused its discretion in finding that plaintiff was able to pay the attorney fees. Here, plaintiff's higher salary clearly gave him a greater ability to pay than defendant. Although plaintiff had substantial monthly expenses, these expenses were of his own making. Defendant should not be punished for plaintiff's fiscal irresponsibility. Plaintiff controlled the finances of the parties during the marriage and incurred the substantial debts for which he and defendant are now liable. He decided to take on two large mortgages and incur the credit card debt. He also incurred another $45,000 in credit card debt after he filed the complaint for divorce. If plaintiff had been fiscally responsible, he would have been able to pay defendant's attorney fees on his $64,000 salary. In light of these circumstances, I cannot say the trial court abused its

discretion in holding that plaintiff was able to pay $35,000 of defendant's attorney fees. I agree with the Court of Appeals, however, that this case should be remanded to ensure that the award includes only attorney fees directly associated with the divorce case, not the child abuse or neglect case or any other matter.

KELLY, J. I join the statement of Justice CORRIGAN.

PEOPLE v UNGER, No. 136781; reported below 278 Mich App 210.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). Defendant was convicted of first-degree murder after a highly publicized and sensational jury trial. The Court of Appeals affirmed the verdict,[1] but expressed displeasure at several instances of prosecutorial misconduct during the trial. This Court should consider this misconduct to determine whether defendant received a fair trial.

The Court of Appeals concluded that the prosecutor crossed the line between strong advocacy and prosecutorial misconduct when it

> suggested that defense counsel had "re-victimized" Florence Unger during the course of trial. A prosecutor may not appeal to the jury to sympathize with the victim. Nor may a prosecutor urge the jury to convict as a part of its civic duty or on the basis of its prejudices. The prosecution's comments were . . . improper.
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> The prosecution also clearly exceeded the bounds of proper argument when it suggested (1) that defense counsel had attempted to "confuse the issue[s]" and "fool the jury" by way of "tortured questioning," "deliberately loaded questions," and "a deliberate attempt to mislead," (2) that defense counsel had attempted to . . . us[e] "red herrings" and "smoke and mirrors," and (3) that defense counsel had attempted "to deter [the jury] from seeing what the real issues are in this case."
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> . . . Arguing that an expert witness had a financial motive to testify is one thing; arguing that the expert has intentionally misled the jury is quite another. . . . [I]n a case that turns largely on conflicting expert testimony, a prosecutor must take special steps to avoid misconduct designed to impugn the integrity of the defendant's experts. . . . We find that the challenged prosecutorial remarks unnecessarily and impermissibly impugned the integrity

[1] *People v Unger*, 278 Mich App 210 (2008).

> of Dr. Paul and that the prosecution committed misconduct in this respect.[2]

However, the Court of Appeals dismissed any notion that these improper arguments affected the jury's verdict by stating that the trial court's jury instructions cured the midsconduct.[3] The judge told the jury that the prosecutor's comments were not evidence.

In *People v Tyson*,[4] this Court held that a prosecutor must not improperly impugn the integrity of a defendant's experts, especially in a case that turns largely on conflicting expert testimony. Here, the prosecutor did not take special steps to avoid misconduct, and his comments threatened defendant's right to a fair trial. This is especially true because there was no direct evidence of defendant's guilt, and the prosecution relied heavily on circumstantial evidence.

As a consequence, the Court should grant leave to appeal to determine whether the prosecutorial misconduct denied defendant a fair trial.

In re COBB (DEPARTMENT OF HUMAN SERVICES v COBB), No. 137475; Court of Appeals No. 285885.

Appeal Dismissed October 24, 2008:

PEOPLE v LIPSEY, No. 136147. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 283166.

Summary Disposition October 27, 2008:

PEOPLE v HOUCK, No. 136980. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether offense variable 9, MCL 777.39, and offense variable 10, MCL 777.40, were properly scored under the facts of this case. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 285203.

Leave to Appeal Denied October 27, 2008:

PEOPLE v KENNEDY MATTHEWS, No. 131710. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 266473.

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[2] *Id*. at 237-240 (citations omitted).

[3] *Id*. at 234, 238, 240-241.

[4] *People v Tyson*, 423 Mich 357 (1985).

PREFERRED MEDICINE, INC v ALLSTATE INSURANCE COMPANY, No. 132955; Court of Appeals No. 263451.

ALLSTATE INSURANCE COMPANY v A&A MEDICAL TRANSPORTATION SERVICES, INC, Nos. 133348 and 133349; Court of Appeals Nos. 260766 and 261504.

BEST CARE REHABILITATION, INC v ALLSTATE INSURANCE COMPANY, No. 134222; Court of Appeals No. 272395.

PEOPLE v BOWENS-FRAZIER, No. 135627; Court of Appeals No. 281757.

PEOPLE v GRATTON, No. 135883; Court of Appeals No. 273921.

PEOPLE v BRASWELL, No. 135943; Court of Appeals No. 271210.

PEOPLE v LOCKMAN, No. 135977; Court of Appeals No. 273330.

PEOPLE v SIMPSON, No. 136152; Court of Appeals No. 283426.

PEOPLE v JAMES SPARKS, No. 136180; Court of Appeals No. 277042.

PEOPLE v WASHINGTON, No. 136222. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279139.

PEOPLE v ROBERT MILLER, No. 136229; Court of Appeals No. 283225.

PEOPLE v CAMERON WILLIAMS, No. 136248. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279658.

PEOPLE v HAVENS, No. 136250. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280571.

PEOPLE v COLE, No. 136264. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280413.

PEOPLE v RASHAD, No. 136269. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282453.

PEOPLE v STEWART, No. 136302. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281316.

PEOPLE v SMITH-BEY, No. 136331; Court of Appeals No. 274243.

PEOPLE v HOFFMAN, No. 136342. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280065.

PEOPLE v MENEFEE, No. 136360. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280733.

PEOPLE v PAGE, No. 136367; Court of Appeals No. 283369.

PEOPLE v MCGOWAN, No. 136370; Court of Appeals No. 275781.

PEOPLE v ALEJANDRO GARDNER, No. 136378. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283147.

PEOPLE v TOWNSEND, No. 136385. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280287.

PEOPLE v ADKINS, No. 136399. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280221.

PEOPLE v HIGGINS, No. 136401; Court of Appeals No. 276124.

PEOPLE v WILEY, No. 136403. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281608.

PEOPLE v GONZALEZ, No. 136404. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 283272.

PEOPLE v TIGGART, No. 136427. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 283651.

PEOPLE v WALTER JONES, No. 136430. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282204.

PEOPLE v BRADLEY, No. 136434. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279978.

PEOPLE v SCOTT MARTIN, No. 136447. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283037.

PEOPLE v KORCAMONI MCCLELLAN, No. 136459. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282854.

PEOPLE v DUCKETT, No. 136466. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283311.

PEOPLE v ROGER YOUNG, No. 136468. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281435.

PEOPLE v BECHTOL, No. 136470. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280131.

PEOPLE v JOHN WILLIAMS, No. 136475; Court of Appeals No. 275589.

CORRIGAN, J., did not participate for the reasons stated in *People v Parsons*, order of the Supreme Court, entered March 6, 2007 (Docket No. 132975).

PEOPLE v TRAN, No. 136476. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283483.

PEOPLE v FRAZIER, No. 136479; Court of Appeals No. 275083.

PEOPLE v BUTLER, No. 136498. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283134.

PEOPLE v RUGGLES, No. 136505. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281682.

PEOPLE v STIFF, No. 136507. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283732.

PEOPLE v DRYER, No. 136516; Court of Appeals No. 275342.

PEOPLE v KENNETH SPARKS, No. 136519. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283273.

PEOPLE v LEROY SIMMONS, No. 136526; Court of Appeals No. 270832.

PEOPLE v BLUMENTHAL, No. 136528. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282633.

PEOPLE v EDWARD MANUEL, No. 136530. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282166.

PEOPLE v LANDERS, No. 136539. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280800.

PEOPLE v DWAYNE HALL, No. 136547. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279046.

PEOPLE v DOOLITTLE, No. 136550; Court of Appeals No. 271739.

PEOPLE v TONY MCCLELLAN, No. 136551. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282369.

PEOPLE v LINT, No. 136552. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281800.

PEOPLE v DERRICK JOHNSON, No. 136554. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280712.

PEOPLE v SOLI, No. 136558; Court of Appeals No. 283918.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v SCHNIERS, No. 136559; Court of Appeals No. 283260.

PEOPLE v MARVIN LEWIS, No. 136563. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283491.

PEOPLE v BAEZ, No. 136570. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280564.

PEOPLE v DUANE MILLS, No. 136572. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283142.

PEOPLE v JENDRZEJEWSKI, No. 136585. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 280066.

PEOPLE v FINLEY, No. 136587. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282094.

PEOPLE v LAMAR CLARKE, No. 136594; Court of Appeals No. 281620.

PEOPLE v COURTNEY, No. 136596. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283126.

PEOPLE v TINA CLARKE, No. 136599. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282375.

PEOPLE v DAMRON, No. 136602; Court of Appeals No. 284187.

PEOPLE v THOMAS PALMER, No. 136609. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280880.

PEOPLE v CHERYL YOUNG, No. 136626. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283145.

PEOPLE v WILLIE LOVE, No. 136627. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284898.

PEOPLE v DEANDRE KNIGHT, No. 136628. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282559.

PEOPLE v CHMIELEWSKI, No. 136629. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283205.

PEOPLE v THOMAS JONES, No. 136640. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280849.

PEOPLE v MORTON, No. 136645. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284120.

PEOPLE v ABRAM, No. 136650. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283345.

PEOPLE v WIGGINS, No. 136657; Court of Appeals No. 281407.

PEOPLE v TIMES, No. 136659; Court of Appeals No. 274209.

PEOPLE v WADE, No. 136661; Court of Appeals No. 284457.

FEDERAL INSURANCE COMPANY v CONBRACO INDUSTRIES, INC and CITIZENS INSURANCE COMPANY v NORTHERN INDUSTRIAL REFRIGERATION, INC, Nos. 136672 and 136673; Court of Appeals Nos. 274351 and 274421.

PEOPLE v MESECAR, No. 136696; Court of Appeals No. 284108.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v BURTON, No. 136702; Court of Appeals No. 278148.

PEOPLE v HORN, No. 136718; reported below: 279 Mich App 31.

GUARDIAN ENVIRONMENTAL SERVICES, INC v BUREAU OF CONSTRUCTION CODES AND FIRE SAFETY, No. 136746; reported below: 279 Mich App 1.

PEOPLE v JAMES DIXON, No. 136769; Court of Appeals No. 283136.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v CHANTANUS FRANKLIN, No. 136770; Court of Appeals No. 275203.

PEOPLE v MURRIEL, No. 136778; Court of Appeals No. 276687.

PEOPLE v ELIE, No. 136780; Court of Appeals No. 277988.

PEOPLE v AMY THOMPSON, No. 136782; Court of Appeals No. 284476.

BRAVERMAN v PIERCE, No. 136788; Court of Appeals 274165.

KIM v WERNETTE, No. 136797; Court of Appeals No. 277362.

PEOPLE v MAZUREK, No. 136800; Court of Appeals No. 275755.

PEOPLE v HAMBLIN, No. 136805; Court of Appeals No. 277833.

PEOPLE v KING, No. 136809; Court of Appeals No. 278101.

PEOPLE v CALHOUN, No. 136813; Court of Appeals No. 284958.

PEOPLE v WHYTE, No. 136814; Court of Appeals No. 276488.

BRONSON METHODIST HOSPITAL v KURTZ, No. 136818; Court of Appeals No. 274938.

PEOPLE v HOLDEN, No. 136819; Court of Appeals No. 272633.

PEOPLE v OLLILA, No. 136824; Court of Appeals No. 274541.

PEOPLE v STAPLETON, No. 136842; Court of Appeals No. 264175.

PEOPLE v HOSFELT, No. 136847; Court of Appeals No. 284917.

PEOPLE v QUINN, No. 136855; Court of Appeals No. 285422.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v HEXIMER, No. 136857; Court of Appeals No. 283686.

PEOPLE v MALIK, No. 136860; Court of Appeals No. 274507.

PEOPLE v JOHN RODGERS, No. 136871; Court of Appeals No. 285018.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v JACQUELINE CURRY, No. 136873; Court of Appeals No. 284587.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v WALLS, No. 136875; Court of Appeals No. 284780.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v DEON WILSON, No. 136876; Court of Appeals No. 284805.

MOORE v DEPARTMENT OF CORRECTIONS, No. 136878; Court of Appeals No. 283169.

BROE REHABILITATION SERVICES, INC v ALLSTATE INSURANCE COMPANY, No. 136882; Court of Appeals No. 275587.

BRISTOL MANUFACTURING, INC v JENNINGS GENERAL MAINTENANCE, INC, No. 136893; Court of Appeals No. 272006.

DEWITT v SEALTEX COMPANY, INC, Nos 136895 and 136897; Court of Appeals Nos. 273387, 273390, and 275931.

PEOPLE v JOHNSON-PEEL, No. 136898; Court of Appeals No. 271478.

PITCHER v SEALTEX COMPANY, INC, No. 136899; Court of Appeals No. 274255.

PEOPLE v TIMOTHY SMITH, No. 136902; Court of Appeals No. 277903.

UNITY APOSTOLIC CATHEDRAL v WAYNE COUNTY TREASURER, No. 136908; Court of Appeals No. 263499.

PEOPLE v RONALD WAYNE HARRIS, No. 136910; Court of Appeals No. 270621.

PEOPLE v MEDRANO, No. 136913; Court of Appeals No. 285066.

PEOPLE v NIKO SIMMONS, No. 136914; Court of Appeals No. 285409.

PEOPLE v MOSES, No. 136916; Court of Appeals No. 277151.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC v MAJIC FUNDING, LLC, No. 136922; Court of Appeals No. 277343.

PEOPLE v GLENN WILLIAMS, No. 136929; Court of Appeals No. 284585.

PEOPLE v JAWORSKI, No. 136932; Court of Appeals No. 283388.

LIU v SHEPARD, No. 136934; Court of Appeals No. 285098.

PEOPLE v CRENSHAW, No. 136936; Court of Appeals No. 274238.

PEOPLE v SHEPHERD, No. 136938; Court of Appeals No. 284117.

PEOPLE v RUDDENE MILLER, No. 136944; Court of Appeals No. 276589.

PEOPLE v CAREY, No. 136946; Court of Appeals No. 277902.

In re PETERSON (PETERSON v WAYNE CIRCUIT JUDGE), No. 136947; Court of Appeals No. 282794.

PEOPLE v RASHEEN BROWN, No. 136949; Court of Appeals No. 270877.

PEOPLE v GEE, No. 136953; Court of Appeals No. 285191.

PEOPLE v MEYER, No. 136958; Court of Appeals No. 285224.

RICHFIELD LANDFILL, INC v STATE OF MICHIGAN, No. 136959; Court of Appeals No. 272519.

PEOPLE v GAMMAGE, No. 136964; Court of Appeals No. 285229.

PEOPLE v LOUIS, No. 136965; Court of Appeals No. 275652.

CORRIGAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Thompson*, 477 Mich 146 (2007).

PEOPLE v PETERSON, No. 136968; Court of Appeals No. 278317.

GARNER v ANDROID INDUSTRIES, LLC, No. 136977; Court of Appeals No. 282171.

PEOPLE v GLISSON, No. 136987; Court of Appeals No. 285903.

PEOPLE v MALONE, No. 136989; Court of Appeals No. 284341.

PEOPLE v LEATHERWOOD, No. 137010; Court of Appeals No. 277021.

PEOPLE v WATSON, No. 137013; Court of Appeals No. 272732.

PEOPLE v ROBERT FOX, JR, No. 137016; Court of Appeals No. 283681.

PEOPLE v DEANDRE GRAY, No. 137021; Court of Appeals No. 276292.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v MATTHEW ROBINSON, No. 137022; Court of Appeals No. 277796.

PEOPLE v CHARLES THOMAS, No. 137023; Court of Appeals No. 285336.

PEOPLE v GLOSSON, No. 137030; Court of Appeals No. 276823.

PEOPLE v COLWELL, No. 137037; Court of Appeals No. 285598.

PEOPLE v MINTON, No. 137039; Court of Appeals No. 285521.

PEOPLE v DOMACO SIMS, No. 137041; Court of Appeals No. 274236.

PEOPLE v DAMARR JONES, No. 137042; Court of Appeals No. 286102.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

MCFADDEN v DELPHI CORPORATION, No. 137043; Court of Appeals No. 282627.

PEOPLE v NATHANIEL HAYNES, No. 137053; Court of Appeals No. 285424.

PEOPLE v GREGORY COOK, No. 137059; Court of Appeals No. 276596.

PEOPLE v ODOM, No. 137062; Court of Appeals No. 275840.

PEOPLE v SIAN, No. 137065; Court of Appeals No. 278459.

PEOPLE v STEARNS, No. 137079; Court of Appeals No. 281160.

PEOPLE v MITCHELL, No. 137081; Court of Appeals No. 274004.

PEOPLE v SEALEY, No. 137082; Court of Appeals No. 285816.

PEOPLE v BRIGGS, No. 137086; Court of Appeals No. 285539.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

FORRO v MICHIGAN STATE UNIVERSITY, No. 137095; Court of Appeals No. 283993.

PEOPLE v JAMES LEWIS, No. 137101; Court of Appeals No. 277755.

PEOPLE v DUNNUCK, No. 137105; Court of Appeals No. 278328.

PEOPLE v HITTLE, No. 137139; Court of Appeals No. 285712.

ROBINSON v BIRDS EYE FOODS, INC, No. 137160; Court of Appeals No. 277339.

PEOPLE v BONIOR, No. 137236. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286646.

CONCERNED CITIZENS OF ACME TOWNSHIP v ACME TOWNSHIP, No. 137237; Court of Appeals No. 286796.

PEOPLE v RHYNDRESS, No. 137287; Court of Appeals No. 278811.

Reconsiderations Denied October 27, 2008:

WEST v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 132156. Leave to appeal denied at 482 Mich 880. Court of Appeals No. 251003.

In re MILES ESTATE (MILES v SOLEUS HEALTHCARE SERVICES OF MICHIGAN, INC), No. 133829. Leave to appeal denied at 482 Mich 891. Court of Appeals No. 270033.

CIARAMITARO v GREEKTOWN CASINO, LLC, No. 135250. Appeal dismissed December 12, 2007 (Docket No. 135250). Court of Appeals No. 279388.

PEOPLE v WARD, No. 135529. Leave to appeal denied at 481 Mich 877. Court of Appeals No. 280907.

PEOPLE v SEARIGHT, No. 135641. Leave to appeal denied at 480 Mich 1138. Court of Appeals No. 281536.

DRAKE v SCHANTZ-RONTAL, No. 135879. Leave to appeal denied at 482 Mich 890. Court of Appeals No. 270225.

WEAVER, J. I would grant the motion for reconsideration.

KELLY, J. I would grant the motion for reconsideration for the reasons set forth in Justice WEAVER's dissenting statement in this case, 482 Mich 890 (2008).

PEOPLE v KELLY, No. 135899. Leave to appeal denied at 482 Mich 893. Court of Appeals No. 278997.

PEOPLE v COMSTOCK, No. 136061. Leave to appeal denied at 481 Mich 914. Court of Appeals No. 274133.

PEOPLE v MONTEZ COOPER, No. 136181. Leave to appeal denied at 482 Mich 973. Court of Appeals No. 282525.

PEOPLE v WOOTEN, No. 136219. Leave to appeal denied at 482 Mich 973. Court of Appeals No. 283691.

RESSLER v HUNTERS CREEK ESTATES, No. 136252. Leave to appeal denied at 481 Mich 917. Court of Appeals No. 280110.

JACOBSON v NORFOLK DEVELOPMENT CORPORATION, No. 136260. Leave to appeal denied at 481 Mich 917. Court of Appeals No. 273708.

GITLER v CLAWSON, No. 136270. Leave to appeal denied at 481 Mich 917. Court of Appeals No. 279846.

PEOPLE v THOMPKINS, No. 136305. Leave to appeal denied at 482 Mich 974. Court of Appeals No. 281974.

WRIGHT v MICRO ELECTRONICS, INC, No. 136324. Leave to appeal denied at 482 Mich 882. Court of Appeals No. 274668.

RODRIGUEZ v MERCHANT, No. 136356. Leave to appeal denied at 482 Mich 896. Court of Appeals No. 282671.

MACOMB TOWNSHIP v MICHAELS, No. 136923. Leave to appeal denied at 482 Mich 948. Court of Appeals No. 286640.

Leave to Appeal Granted October 30, 2008:

In re HUDSON (DEPARTMENT OF HUMAN SERVICES v MORGAN), No. 137362. The parties shall include among the issues to be addressed whether: (1) petitioner presented clear and convincing evidence of statutory grounds for termination of respondent-mother's parental rights; (2) petitioner presented clear and convincing evidence that termination was not contrary to the children's best interests; (3) this Court should address the issues raised by respondent in the Court of Appeals; and (4) the issues raised by respondent in the Court of Appeals were properly decided.

We further order the Clinton Circuit Court, Family Division, utilizing a procedure analogous to that described in Administrative Order No. 2003-3, to determine no later than November 10, 2008, whether respondent-appellee is indigent and, if so, to appoint attorney Vivek S. Sankaran, of the University of Michigan Law School, Child Advocacy Law Clinic, if feasible, to represent respondent in this Court. If respondent is not indigent, she must retain her own counsel.

The Children's Law Section and the Family Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 282765.

Leave to Appeal Denied October 30, 2008:

ANDERSON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 137228; Court of Appeals No. 277096.

CAVANAGH and KELLY, JJ. We would reverse the Court of Appeals.

Summary Disposition October 31, 2008:

COMPTON v PASS, No. 132506. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals

and we remand this case to the Court of Appeals for reconsideration, in light of *Stone v Williamson*, 482 Mich 144 (2008), of whether this is a lost-opportunity case and whether the defendants are entitled to summary disposition under MCL 600.2912a(2). On remand, the Court of Appeals shall also consider the other issues raised by the parties, but not addressed by that court during its initial review of this case, to the extent necessary to resolve this case. Court of Appeals No. 260362.

MARKMAN, J. (*concurring*). The trial court denied defendants' motion for summary disposition; but, after the close of plaintiff's proofs, granted defendants' motion for a directed verdict. The Court of Appeals reversed the trial court's order denying defendants' motion for summary disposition and vacated the trial court's subsequent orders. MCL 600.2912a(2) provides, in pertinent part, "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." We recently addressed this provision with some considerable lack of consensus in *Stone v Williamson,* 482 Mich 144 (2008).

Plaintiff's expert testified that the decedent's premalpractice chance of not suffering from lymphedema or axillary cording was at least 97%, while her postmalpractice chance of not suffering from lymphedema was 82% and her postmalpractice chance of not suffering from axillary cording was 90%. I believe that this is a lost opportunity cause of action because "it is possible that the bad outcome would have occurred even if the patient had received proper treatment." *Stone, supra* at 218 (MARKMAN, J., concurring in the result only). Further, utilizing the formula described in my opinion in *Stone,* plaintiff satisfies the § 2912a requirement. I would reverse the Court of Appeals, but for the fact that my opinion did not carry the day. Therefore, I must accede to the remand order.

Leave to Appeal Denied October 31, 2008:

BAKER v ST JOHN HEALTH SYSTEMS, No. 133525; Court of Appeals No. 267284.

MARKMAN, J. (*concurring*). The trial court granted defendants' motion for summary disposition, but the Court of Appeals reversed. MCL 600.2912a(2) provides, in pertinent part, "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." We recently addressed this provision with some considerable lack of consensus in *Stone v Williamson,* 482 Mich 144 (2008). Given their decisions in *Stone,* I believe it is clear that my six colleagues would either conclude that this is not a lost opportunity cause of action, or, if it is, that plaintiff has satisfied the § 2912a(2) requirement. For that reason, I concur in the denial order, even though I would reverse had my position in *Stone* prevailed.

Plaintiff's expert testified that the decedent's premalpractice chance of survival was 51% and her postmalpractice chance of survival was "5% or less." I believe that this is a lost opportunity cause of action because "it

is possible that the bad outcome would have occurred even if the patient had received proper treatment." *Stone, supra* at 218 (MARKMAN, J., concurring in the result only). Further, utilizing the formula described in my opinion in *Stone,* plaintiff would only satisfy the § 2912a requirement if the decedent's postmalpractice chance of surviving was 1% or less. If her postmalpractice chance was 5%, as plaintiff's expert admitted that it might have been, plaintiff would not satisfy the § 2912a requirement. Because plaintiff has the burden of demonstrating that the § 2912a requirement is satisfied, and she has not done so here, I would reverse. However, because my interpretation of § 2912a did not carry the day in *Stone,* I accede to the denial order.

SHAFFER V ST JOSEPH'S MERCY HOSPITALS OF MACOMB, No. 135781; Court of Appeals No. 275299.

MARKMAN, J. (*concurring*). The trial court denied defendant's motion for summary disposition, and the Court of Appeals affirmed. MCL 600.2912a(2) provides, in pertinent part, "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." We recently addressed this provision with some considerable lack of consensus in *Stone v Williamson,* 482 Mich 144 (2008). Given their decisions in *Stone,* I believe it is clear that my six colleagues would either conclude that this is not a lost opportunity cause of action, or, if it is, that plaintiff has satisfied the § 2912a(2) requirement. For that reason, I concur in the denial order, even though I would reverse had my position in *Stone* prevailed.

Plaintiff's expert testified that the decedent's premalpractice chance of a better result was "greater than 50%." However, there is no testimony regarding the decedent's postmalpractice chance of a better result. I believe that this is a lost opportunity cause of action because "it is possible that the bad outcome would have occurred even if the patient had received proper treatment." *Stone, supra* at 218 (MARKMAN, J., concurring in the result only). Further, because plaintiff has presented no testimony regarding her postmalpractice chance of a better result, it is impossible to determine whether plaintiff satisfies the § 2912a requirement. Because plaintiff has the burden of demonstrating that the § 2912a requirement is satisfied, and she has not done so here, I would reverse. However, because my interpretation of § 2912a did not carry the day in *Stone,* I accede to the denial order.

ASKEW V DEPARTMENT OF CORRECTIONS, No. 136574; Court of Appeals No. 282916.

KELLY, J. (*dissenting*). The issue in this case is whether the Court of Appeals practice of refusing to allow prisoners to commence new appeals until they have paid outstanding fees and costs is constitutional. It appears that the practice is consistent with MCL 600.2963(8), which provides that "[a] prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid." However, this statute could be unconstitutional because it prevents a person from having access to the courts.

Plaintiff claims he is indigent. If indigent, he is unable to pay back fees and costs. Yet, this statute prevents him from accessing the courts until he pays back fees and costs. Hence, he is in a Catch-22. He cannot pay the outstanding fees until he acquires the necessary funds, and he cannot file a new appeal until he pays the outstanding fees.

In an unpublished opinion out of the United States District Court for the Western District of Michigan, Judge Richard Enslen indicated that he was troubled by this practice.[*] I believe this Court should grant leave to appeal. We should consider whether it is unconstitutional to dismiss an appeal for failure to pay outstanding fees when a plaintiff can show that he is indigent.

PEOPLE v RICHMOND, No. 136648; Court of Appeals No. 277012.

KELLY, J. (*dissenting*). In this criminal case, following the trial court's suppression of the prosecution's key evidence, the prosecution moved to dismiss the case, and the judge entered a *nolle prosequi* order. The prosecution then appealed the adverse evidentiary ruling and the Court of Appeals reversed the ruling, permitting reinstatement of the charges against defendant. Defendant has now appealed that decision to this Court, arguing that the Court of Appeals lacked jurisdiction to hear the appeal because the issue is moot.

The prosecution lacked standing to appeal in the Court of Appeals. It failed to obtain a stay of the proceedings, appealing instead from a dismissal that it had requested. Hence, it was not "an aggrieved party" and, for that reason, lacked standing.[1] Indeed, the prosecutor admits that "it is the better practice" for the prosecutor to "obtain a motion to dismiss from the defense or a dismissal on the court's own motion so as to avoid a claim that the prosecutor cannot appeal that which itself has obtained . . . ."

It is beyond argument that the evidentiary issue is moot, and that this Court does not hear moot issues except under exceptional circumstances not applicable here. *Detroit v Ambassador Bridge Co*.[2]

The prosecution has relied on *Dybata v Kistler*[3] for the proposition that a claim of appeal may be taken from a stipulated dismissal necessitated by an evidentiary ruling. *Dybata* is inapposite here, given that it was a civil case and the parties had stipulated to the dismissal. The

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[*] *Bridges v Collette*, 2008 US Dist LEXIS 58, *7 n 3 (2008). "Having determined that the suit must be dismissed, the Court is nevertheless troubled that this prisoner, and others like him, appear to be indigent and appear to have lawsuits dismissed due to fee balances which they cannot cure given their indigency. Should this pattern persist, then eventually the United States Supreme Court would be obliged to address why the Defendant Judges are not providing equal access to the courts to indigent prisoners."

[1] MCL 770.3.

[2] *Detroit v Ambassador Bridge Co*, 481 Mich 29, 50-51 (2008).

[3] *Dybata v Kistler*, 140 Mich App 65, 68 (1988).

Court should abide by the precedent on mootness that it set in *Ambassador Bridge* and the law on standing established by the Legislature in MCL 770.3.

For these reasons, I would vacate the Court of Appeals judgment and dismiss the case for mootness.

CAVANAGH, J. I join the statement of Justice KELLY.

MARKMAN, J. (*dissenting*). I respectfully dissent. "This 'Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us . . . .' " *Detroit v Ambassador Bridge*, 481 Mich 29, 50 (2008), quoting *Federated Publications v City of Lansing*, 467 Mich 98, 112 (2002). This is because the judiciary is constrained by our constitution to exercise only the "judicial power." Const 1963, art 3, § 2; *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 637 (2004). "Perhaps the most critical requirement of the 'judicial power' has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute . . . ." *Id.* at 615 (citation omitted). "We are to decide questions arising and undetermined in a case pending, and we may not tender advice upon matters not in litigation." *Anway v Grand Rapid R Co*, 211 Mich 592, 611-612 (1920) (citation and quotation marks omitted).

Any existing "controversy" between the parties in this matter was rendered moot when the case was dismissed on the prosecutor's motion. At that time, the action no longer existed and there was no outstanding controversy for the Court of Appeals or this Court to consider. It is of no moment, in my judgment, that the prosecutor may now refile the charges and, assuming the trial court makes the same ruling, appeal that ruling and end up in the exact same position as we are in now. " 'When the judgment appealed from cannot be affected by the decision of the appellate court the case becomes a moot one and the appeal should be dismissed; hearing and deciding such an appeal for the purpose of establishing a rule of observance in cases subsequently arising is not an exercise of judicial power.' " *Id.* at 614-615 (citation omitted).

This Court cannot ignore its own precedent. The prosecutor's dismissal rendered this case moot, such that neither the Court of Appeals nor this Court any longer has jurisdiction to render a decision. Accordingly, I would vacate the Court of Appeals judgment and dismiss this case.

PEOPLE v JAMES WILLIAMS, No. 136903; Court of Appeals No. 285155.

MARKMAN, J. (*concurring*). I write separately only to reiterate the concerns expressed in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006). In *Wright*, I stated that parolees are entitled to a determination "regarding how much, if any, additional time must be served for the parole violation." *Id.* at 1140. Currently, parolees receive no such determination and remain in jail for an indeterminate length of time for their parole violation until they are sentenced for the newly committed crime. The result is that similarly situated parolees often receive an unequal amount of additional time on the basis of "the fortuity of how long it takes the criminal justice system to proceed to a defendant's final sentencing." *Id.*

Within the past two years, this Court has received at least 60 applications for leave to appeal on this issue. Regardless of the eventual outcome in this Court, resolving this issue would provide a significant benefit to the operations of our state's legal system, and would provide important guidance for parole violators, trial judges, and the Department of Corrections. I believe it is long past time for the Court to conclusively resolve this question.

CAVANAGH, J. I join the statement of Justice MARKMAN.

KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

In re VALDEZ (DEPARTMENT OF HUMAN SERVICES v VALDEZ), No. 137468; Court of Appeals No. 284081.

Leave to Appeal Granted November 5, 2008:

HENRY v DOW CHEMICAL COMPANY, No. 136298. The parties shall include among the issues to be briefed: (1) whether the "rigorous analysis" requirement for class certification that is applied in the federal courts also applies to state class actions, see *Gen Tel Co of the Southwest v Falcon,* 457 US 147, 161 (1982); (2) if so, whether the Saginaw Circuit Court engaged in the required rigorous analysis to determine if class certification was appropriate; (3) whether the plaintiffs met all of the requisites for class certification established in MCR 3.501(A)(1), including the requirement that questions of law or fact common to the members of the class predominate over questions affecting only individual members; and (4) whether the plaintiffs established that they suffered injury on a class-wide basis in order to justify class certification.

The Litigation Section of the State Bar of Michigan and the Michigan Association for Justice are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 266433.

Leave to Appeal Denied November 5, 2008:

PEOPLE v POLLO, No. 136930; Court of Appeals No. 283107.

KELLY, J. (*dissenting*). The Court should grant leave to appeal to examine the questionable practice used by the trial court in this case. After trial and sentencing, defendant filed a motion for resentencing asserting that offense variable (OV) 9 had been misscored. Once the error was corrected, defendant argued, his sentence would no longer fall within the scored guidelines range, and he should be resentenced. The prosecutor was obliged to acknowledge that OV 9 had been improperly scored. But, for the first time, it claimed that OV 19 had been improperly scored as well. OV 19 had been scored at zero at sentencing. The prosecutor now argued that OV 19 should be scored at 10.

Defendant had slashed his wrists when officers tried to arrest him. The prosecutor had not argued at sentencing that this desperate behavior

constituted interference with the administration of justice for purposes of OV 19. It was only after agreeing that OV 9 had been improperly scored that the prosecutor advanced this position.

The trial court denied defendant's motion without conducting a hearing. The court agreed with defendant that OV 9 should have been scored at zero, but also agreed with the prosecutor that OV 19 should have been scored at 10 points. As a result, the guidelines range did not change, and resentencing was unnecessary.

To allow a judge who made a mistake at sentencing to rescore other offense variables to nullify the damage done by the misscored variable without a hearing is troublesome. The defendant had no opportunity to present any objection or input to the rescoring of OV 19. Rather than ignore this practice, the Court should grant leave to appeal to consider whether it should be permitted and, if so, under what circumstances.

PEOPLE V TRAPP, No. 136056; Court of Appeals No. 282662.

PEOPLE V TAMMY WILLIAMS, No. 136757; Court of Appeals No. 284938.

HARVEY V GENERAL MOTORS CORPORATION, No. 136801. The application for leave to appeal the May 23, 2008, order of the Court of Appeals is denied, because we are not persuaded that the question presented should be reviewed by this Court. However, we would note that the Workers' Compensation Appellate Commission erred in stating that an employee does not need to demonstrate a connection between wage loss and the work-related injury. An employee is indeed required to demonstrate such a connection. See MCL 418.301(4); *Sington v Chrysler Corp,* 467 Mich 144, 160-161 (2002). Court of Appeals No. 281827.

CAVANAGH AND KELLY, JJ. We would deny leave to appeal without the further statement found in the majority's order.

CHURCHILL V JP KING AUCTION COMPANY, INC, No. 136851; Court of Appeals No. 274461.

KELLY, J. I would grant leave to appeal.

PEOPLE V KIRCHER, No. 137426; Court of Appeals No. 287977.

Complaint Dismissed November 6, 2008:

WENDEL V ATTORNEY GRIEVANCE COMMISSION, No. 137076. The complaint for superintending control is dismissed, because the requests for investigation are currently pending before the Grievance Administrator, who has indicated to the Court that the requests will receive heightened priority. See MCR 9.122(A)(2). AGC : 22999/07 and 22998/07.

Summary Disposition November 7, 2008:

SHANKSTER V FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 137543. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave

granted. The motion to stay the trial court proceedings is granted, and the proceedings in the St. Clair Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 284850.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied November 7, 2008:

ROYCE v CHATWELL CLUB APARTMENTS, No. 134879. By order of January 22, 2008, the application for leave to appeal the August 7, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *Allison v AEW Capital Mgt, LLP* (Docket No. 133771). On order of the Court, the case having been decided on June 25, 2008, 481 Mich 419 (2008), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Although the Court of Appeals relied on *Allison v AEW Capital Mgt, LLP (On Reconsideration),* 274 Mich App 663 (2007), and this Court subsequently reversed that decision in *Allison v AEW Capital Mgt, LLP,* 481 Mich 419 (2008), the Court of Appeals determination in the present case to remand for further proceedings because the trial court used a legally unsound basis for granting summary disposition to defendant with regard to MCL 554.139(1) is not in conflict with the reasoning set forth in this Court's opinion in *Allison.* The trial court on remand must determine whether the defendant owed a duty to the plaintiff under MCL 554.139(1) on the basis of the evidence the plaintiff has presented in this case. Reported below: 276 Mich App 389.

CORRIGAN, J. (*concurring*). I concur in the denial of leave to appeal so that the trial court can decide whether defendant is entitled to summary disposition under this Court's recent decision in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008). I write separately only to express continued adherence to my concurring opinion in *Allison*. For the reasons expressed in that case, I continue to believe that the duty under MCL 554.139(1)(a) to keep the premises and common areas "fit for the use intended by the parties" extends only to significant, structural defects in the property, not to transitory conditions such as snow and ice accumulations. *Id*. at 442.

CAVANAGH, J. (*concurring in result only*). I agree with the order denying defendant's application for leave to appeal. I disagree with the order, however, to the extent that it implies that defendant's duty is dependent on the evidence presented in this case. Defendant has a statutorily mandated duty to plaintiff to keep all common areas, including sidewalks and parking lots, in a condition that is "fit for the use intended by the parties." MCL 554.139(1)(a). The duty is not dependent on the evidence; rather, the trial court must review the evidence to determine whether defendant violated the statutory duty it owed to plaintiff.

KELLY, J. I join the statement of Justice CAVANAGH.

Leave to Appeal Denied November 14, 2008:

SBC v J T CRAWFORD, INC, No. 135581; Court of Appeals No. 275334.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying defendant's application for leave to appeal. I would grant leave to appeal because I believe that the Court of Appeals erred in its interpretation of the protection of underground utilities act, MCL 460.701 *et seq*. (commonly known as the MISS DIG act).

SBC sued general contractor defendant Henkels & McCoy, Inc., and subcontractor defendant J.T. Crawford, Inc., under the MISS DIG act, in this negligence and strict liability action. Consumers Energy contracted with an excavator, Henkels, to repair its underground gas lines at a site in Oakland County. On September 29, 2003, Henkels called the MISS DIG hotline and gave the location of its planned excavation. SBC's representative apparently did not understand Henkels's request to locate SBC's underground utilities. Moreover, SBC's representative did not contact his supervisor for clarification. In any event, SBC's utility lines were not marked. Every other utility company properly marked their underground utilities at the excavation site.

On October 1, 2003, J.T. Crawford, Inc., quoted a price for pile driving to Henkels that specified "excavation" as "work by others." On October 9, 2003, defendant Henkels contracted with Crawford to perform pile driving operations. Crawford was to drive steel sheets into the ground to serve as retaining walls for Henkels's excavations.

Twenty days after notifying MISS DIG, on October 18, 2003, Henkels commenced operations by removing concrete, curbs, and pavement from the excavation site. Henkels also dug test holes to locate marked underground facilities. Two days later, Henkels placed its equipment on site and prepared for pile driving, which Crawford began on October 21, 2003. During its pile driving operations, Crawford transected SBC's unmarked telecommunications cables. On November 19, 2003, Henkels's supervisor e-mailed Crawford and clarified that "[w]e (Henkels & McCoy, Inc.) told J.T. Crawford that he did not have to make the one call (Miss Dig in Mi.) because we had already made the call." Henkels's supervisor concluded, "I certainly am not an attorney, but the company that is responsible for the damage to the lines is not J.T. Crawford but SBC and WOW."

Defendant Henkels settled with SBC. SBC's case proceeded against Crawford. Following discovery, SBC and Crawford filed cross-motions for summary disposition. The circuit court granted summary disposition in favor of Crawford. On appeal, the Court of Appeals reversed, concluding that the ticket issued by MISS DIG had already expired when Crawford

began pile driving under MCL 460.705[1] and MCL 460.714.[2] The Court of Appeals remanded for further fact finding regarding whether competent evidence proved that the damage to SBC's telecommunications cables resulted from Crawford's pile driving. Crawford now seeks leave to appeal in this Court.

In my view, the Court of Appeals erred when it concluded that Crawford could not rely on Henkels's timely notice under the MISS DIG act, but instead that Crawford was itself required to notify SBC before it began pile driving. The plain language of MCL 460.705(1) does not support the Court of Appeals interpretation. "When interpreting statutes, our primary goal is to give effect to the intent of the Legislature." *Nastal v Henderson & Associates Investigations, Inc*, 471 Mich 712, 720

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[1] MCL 460.705(1) provides, in relevant part:

> [A] person or public agency responsible for excavating or tunneling operations, drilling or boring procedures, or discharge of explosives in a street, highway, other public place, a private easement for a public utility, or near the location of utility facilities on a customer's property, or demolition of a building containing a utility facility, shall give written or telephone notice to the association as required in [MCL 460.707] of intent to excavate, tunnel, discharge explosives, or demolish at least 2 full working days, excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days, before commencing the excavating, demolishing, discharging of explosives, tunneling operations, or drilling and boring procedures. Beginning on October 1, 1990, the notice required in this subsection shall be given at least 3 full working days, excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days, before commencing the excavating, demolishing, discharging of explosives, tunneling operations, or drilling or boring procedures.

[2] MCL 460.714 provides:

> In a civil action in a court of this state, when it is shown by competent evidence that damage to the underground facilities of a public utility resulted from excavating, tunneling, drilling or boring procedures, or demolishing operations, or the discharge of explosives, as described in [MCL 460.703] and that the person responsible for giving the notice of intent to excavate, tunnel, demolish, or discharge explosives failed to give the notice, or the person did not employ hand-digging or failed to provide support, the person shall be liable for the resulting damage to the underground facilities, but the liability for damages shall be reduced in proportion to the negligence of the public utility if it fails to comply with [MCL 460.708].

(2005). We review the language of the statute itself and give the words used by the Legislature their common and ordinary meaning. *Id*. "If the statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted." *Id*.

MCL 460.705(1) provides that "a person or public agency responsible for excavating or tunneling operations" must give notice of its intent to excavate "at least 3 full working days, excluding Saturdays, Sundays, and holidays, but not more than 21 calendar days before commencing" with excavation operations. Here, the person "responsible for the excavating or tunneling operation" was the excavator and general contractor, Henkels. To perform repairs on Consumers Energy's underground gas lines, Henkels oversaw an excavation operation. As one part of its larger excavation operation, Henkels subcontracted with Crawford to perform pile driving.

Under the plain language of MCL 460.705(1), only the responsible party is required to furnish notice. As the Court of Appeals interpreted the statute, however, even those parties not responsible for the overall operation, including various subcontractors like Crawford, also must give notice. This reading injects additional language into the statute, namely that "[a] person or public agency responsible for excavating or tunneling operations *or responsible for any related work therein*" must provide notice before beginning work to guard against liability. The Legislature clearly expressed that only "[a] person or public agency" responsible for the excavation operation, and not that every "person or public agency" somewhat responsible for any part of the operation must give notice. The Court of Appeals erred by failing to give effect to the unambiguous statutory language as written.

My view is consistent with a recent case construing the MISS DIG act. United States District Court Judge Gordon Quist also concluded that only the responsible party must furnish notice under the MISS DIG act. *Amoco Pipeline Co v Herman Drainage Systems, Inc,* 212 F Supp 2d 710, 718 (WD Mich, 2002). "Requiring the person actually performing the excavation to notify MISS-DIG thus provides certainty because there can be no question among several possible parties about who should give the notice." *Id*. Judge Quist reasoned, "The fact that one person may provide notice and another person may perform the excavating does not persuade this Court that someone other than the person (be it an individual, a corporation, etc.) responsible for performing the excavation is responsible for giving the notice." *Id*.

The Court of Appeals further erred when it determined that the MISS DIG ticket issued to Henkels on September 29, 2003, had expired when Crawford began pile driving on October 21, 2003. The Court of Appeals wrongly looked to the time that Crawford began pile driving, and not when Henkels began to prepare the excavation site. Giving the word "commence" its plain and ordinary meaning, the Court of Appeals noted that the ordinary definition of "commence" is "to begin; start." *The American Heritage Dictionary* (2006). Similarly, the Court of Appeals defined "begin" as "to take the first step in performing an action." On the basis of these definitions, the Court of Appeals stated, "we believe the

first step in performing the action of pile driving occurs when a pile enters the ground." *SBC v J T Crawford, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2007 (Docket No. 275334), p 6. Of course, pile driving commences when a pile is driven into the ground. But the Court of Appeals misconstrued the statutory language. The true question under the statute is when does the excavation operation begin, not when are various parts of the operation undertaken.

The Court of Appeals reading ignores the pertinent facts. The excavation operation was underway when Crawford began pile driving. Giving effect to the plain meaning of the word "commence" necessitates that we look back to the actual first step in performing the overall excavation. The first step of the excavation operation occurred on October 18, 2003, when Henkels began removing curbs and pavement. Because the removal of curbs and pavement was the true "commencing" of the excavation, 21 days had not elapsed between when the MISS DIG ticket was issued on September 29, 2003, and when Henkels commenced the excavation operation on October 18, 2003.

Because the notice requirements under the MISS DIG act were met, the Court of Appeals should not have remanded for further factual determinations regarding whether the damage to SBC's lines resulted from Crawford's pile driving. Because the trial court properly interpreted the statute, I would grant Crawford's application for leave to appeal and reinstate the trial court's decision granting summary disposition to Crawford.

WILCOX V MUNGER, No. 135702; Court of Appeals No. 275329.

MARKMAN, J. (*concurring*). Although I agree with the result reached by the Court of Appeals, I respectfully disagree with aspects of its analysis.

While on duty as a police officer, Officer Keith P. Heika sexually assaulted Janeane Wilcox. After Heika committed suicide, Wilcox sued both Heika's estate and the Michigan Municipal Risk Management Authority (MMRMA). The MMRMA provides its members coverage for "personal injury" and "wrongful act[s]" that result in an award of money damages. As defined in the MMRMA's policy, personal injury consists of the "violation of civil, statutory or constitutional rights, discrimination or harassment arising out of employment or law enforcement operations." Only "members" are covered by this policy, which encompasses any employee "while acting within the scope of their official duties or operations on behalf of the Member [employer]." Thus, the question becomes whether Heika was a member acting within the scope of his official duties or operations on behalf of his employer.

In *Zsigo v Hurley Med Ctr*, 475 Mich 215, 221 (2006), this Court held that an employee who sexually assaults a victim while " 'purport[ing] to act or to speak on behalf of the principal . . . or [who] was aided in accomplishing the tort by the existence of the agency relationship' " is " 'clearly [acting] outside the scope of [his] employment.' " (Citation omitted.) Thus, we have concluded that an employee who would have been unable to commit a tort "but for" his status as an employee is *not* acting within the scope of his employment. Despite *Zsigo*, the Court of

Appeals, in concluding that Heika *was* a covered member acting within the scope of his employment, stated that "but for Heika's status as a police officer and his response to a call as part of his official duties he would not have gone inside plaintiff's home," where the assault occurred. *Wilcox v Munger*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2007 (Docket No. 275329), at 3. Because *Zsigo* explicitly rejected this "but for" analysis, the Court of Appeals erred, in my judgment, in ignoring this Court's directive regarding what falls outside the scope of one's employment.

The Court of Appeals also offered a separate rationale for why Heika was acting within the scope of his employment. Without specifically referencing *Zsigo*, the Court of Appeals noted that the MMRMA's policy purported to cover personal injury including " 'violation[s] of civil, statutory or constitutional rights, discrimination or harassment,' " *id*., which *Zsigo* would have excluded. In rejecting the MMRMA's definition of "scope of employment," which was based on *Zsigo*, the Court of Appeals stated that, "[p]er the coverage documents, Heika is afforded coverage for the claim of sexual assault (wrongful act) committed while he was acting within the scope of his employment, yet by virtue of committing the personal injury (or wrongful act) action, is deemed to have not been acting within the scope of his employment." *Id*. The Court of Appeals reasoned that this result is "ambiguous" and that such ambiguity must be resolved against the drafter (MMRMA), thereby entitling Heika to coverage. The Court of Appeals rationale again, in my judgment, is incorrect.

Courts should be exceedingly loath to find ambiguity, because there is rarely any clearcut rule of decision-making under such circumstances and decisions often tend to partake of quasi-legislative exercises of judicial power. As this Court stated in *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 165-166 (2004), ambiguity does not exist unless two provisions "irreconcilably conflict" with one another or when one provision is "equally susceptible" to more than one meaning. The MMRMA's policy, while it is perhaps unclear or could have been more precise, is not ambiguous. When analyzing the definition of "personal injury" in conjunction with "scope of employment," the MMRA's policy is explicable under *Zsigo* because it can reasonably be interpreted to provide coverage to an employee who infringes the rights of another at the instruction of the employer. For example, this policy would cover a situation in which a police department routinely encourages, or requires, its officers to arrest a disproportionate number of minorities or discriminate against women when hiring. This interpretation would give full effect to the MMRMA's policy, which covers members who are violating the rights of other individuals with the approval of their employers, while simultaneously giving due deference to this Court's definition of "scope of employment" in *Zsigo*. Thus, the Court of Appeals is incorrect that the policy's coverage of personal injury cannot be read in harmony with *Zsigo*'s definition of "scope of employment." However, despite my disagreement with the Court of Appeals' analysis, I believe that it correctly concluded that Heika is entitled to coverage.

The MMRMA's policy covers *both* "personal injury" and "wrongful acts." The policy defines a wrongful act as "an actual or alleged error, misstatement, act, omission, neglect or *breach of official duty* including misfeasance, malfeasance and nonfeasance." (Emphasis added). When this provision is contrasted with *Zsigo*'s definition of "scope of employment," it becomes reasonably clear that the parties contractually altered what constitutes "scope of employment." Indeed, the definition of "wrongful acts" specifically contemplates coverage for a breach of official duties, which is the exact type of conduct that was excluded in *Zsigo*. Because the MMRMA contractually agreed to include liability for a breach of official duties, which might otherwise fall outside an employee's scope of employment, Heika's estate, I believe, is entitled to coverage under the policy.

In sum, although the Court of Appeals erred by (1) applying the "but for" definition of "scope of employment" that this Court rejected in *Zsigo* and (2) finding the contract "ambiguous," it nonetheless reached the correct result because the contract itself expanded the definition of "scope of employment" to include Heika's breach of his official duties.

PEOPLE v BANKS, No. 136524. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283547.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal because I do not believe a trial court is required to assess ability to pay under *People v Dunbar*, 264 Mich App 240 (2004), before requiring a defendant who is in prison to commence payment of the cost of a court appointed attorney.

In 2003, defendant pleaded no contest to a charge of assault with a dangerous weapon and was sentenced to probation. The January 21, 2003, judgment of sentence required her to pay attorney fees in an amount later calculated to be $810. Defendant failed to pay the fees. After she later pleaded guilty of second-degree murder in connection with a crime committed on October 7, 2006, defendant was sentenced to 22 to 40 years of imprisonment. After she began serving her prison sentence and obtained employment in prison, the trial court entered an "Order to Remit Prisoner Funds for Fines, Costs, and Assessments," requiring the Department of Corrections to collect 50 percent of the funds defendant receives over $50 a month and remit the funds to Macomb County.

Defendant then filed a motion to modify the attorney fee order in the trial court. Citing *Dunbar*, she asked the court to suspend restitution payments to the county until she was released from prison and at that point conduct a *Dunbar* hearing to assess her ability to pay. The trial court denied the motion on November 30, 2007. Defendant filed an application for leave to appeal in the Court of Appeals, and the Court denied leave to appeal under MCR 6.508(D).

I concur in this Court's denial order because I do not believe that the trial court was required to assess defendant's ability to pay under *Dunbar* before entering the order to remit prisoner funds. The Legislature has specifically provided a procedure by which counties are to recoup attorney fees from defendants who are sentenced to prison. MCL

769.1k(1)(b)(*iii*) explicitly gives a trial court the authority to order reimbursement of attorney fees,[3] and MCL 769.1*l*[4] requires the Department of Corrections to deduct funds from the prisoner's account upon receiving such an order. This statutory scheme leaves no room for a *Dunbar* requirement where the defendant is in prison, so defendant here is ineligible for a *Dunbar* hearing.

KELLY, J. (*dissenting*). I dissent from the order denying leave to appeal. I would remand this case for a hearing to assess defendant's ability to pay now and in the future pursuant to *People v Dunbar*.[1]

Justice CORRIGAN is correct that the trial court was not required to hold a *Dunbar* hearing to assess the defendant's ability to pay before entering the order to remit prisoner funds. But the *Dunbar* requirements should have been adhered to earlier when defendant was sentenced and assessed attorney fees.

In *Dunbar*, the Court of Appeals held that a trial court that orders a convicted defendant to reimburse fees for his court-appointed attorney must provide "some indication . . . that it considered defendant's ability to pay."[2] The Court also held that "in most cases, challenges to the

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[3] MCL 769.1k(1)(b)(*iii*) permits the trial court to "impose . . . [t]he expenses of providing legal assistance to the defendant."

[4] MCL 769.1*l* provides:

> If a prisoner under the jurisdiction of the department of corrections has been ordered to pay any sum of money as described in section 1k and the department of corrections receives an order from the court on a form prescribed by the state court administrative office, the department of corrections shall deduct 50% of the funds received by the prisoner in a month over $50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds $100.00, or the entire amount if the prisoner is paroled, is transferred to community programs, or is discharged on the maximum sentence. The department of corrections shall give an order of restitution under section 20h of the corrections code of 1953, 1953 PA 232, MCL 791.220h, or the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, priority over an order received under this section.

MCL 769.1k and MCL 769.1*l* became effective on January 1, 2006, which is after the trial court entered the judgment of sentence requiring defendant to pay attorney fees, but before it entered the order to remit prisoner funds.

[1] *People v Dunbar*, 264 Mich App 240 (2004).

[2] *Dunbar*, *supra* at 254-255.

reimbursement order will be premature if the defendant has not been required to commence repayment."[3]

In this case, at Macomb County's request, the trial court entered an order to remit prisoner funds for fines, costs, and assessments on October 2, 2007. Defendant filed a motion for relief from judgment on November 15, 2007. Therefore, defendant timely challenged the reimbursement order pursuant to *Dunbar*. There is no indication on the record that the trial court ever assessed defendant's ability to pay attorney fees.

In addition, the statutes cited by Justice CORRIGAN are inapplicable and do not support her contention that defendant "is ineligible for a *Dunbar* hearing." Neither MCL 769.1k nor MCL 769.1*l* diminishes a trial court's responsibility to assess a defendant's ability to pay before ordering restitution. The Court of Appeals recently held explicitly that MCL 769.1k "does not eliminate the requirement, set forth in *Dunbar*, *supra*, that the trial court consider a defendant's ability to pay prior to ordering reimbursement of appointed counsel costs."[4]

Finally, MCL 769.1*l* does not remove the need for a trial court to conduct a *Dunbar* hearing for all defendants, including prisoners. It is a ministerial statute outlining the procedures that the Department of Corrections must follow when removing funds from a prisoner's account.

For these reasons, I would remand this case to the trial court for a *Dunbar* hearing.

SMITH v SMITH, No. 136697; Court of Appeals No. 273547.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal because I believe that the test for "cohabitation" that the Court of Appeals adopted emphasizes definitions of cohabitation that do not square with the contemporary living conditions of cohabiting couples. Because a majority of American couples now cohabit before marriage, the definitions and standards we employ pose questions of jurisprudential significance in cases where the parties have failed to define their terms. Moreover, the Court of Appeals opinion is too uncertain. It leaves too much room for litigation over the essential features of cohabitation that would terminate spousal support obligations.

I note preliminarily that a great deal of time and expense could be saved in postjudgment proceedings if the parties would only define their terms. We construe judgments of divorce like contracts. *Beason v Beason*, 435 Mich 791, 798-799 n 3 (1990). By defining terms such as "cohabitation," parties ensure that courts will construe the language used in a manner that comports with the parties' understanding of their agreement.

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[3] *Id.* at 256, citing *People v Guajardo*, 213 Mich App 198, 202 (1995); *People v LaPine*, 63 Mich App 554, 556, 558 (1975).

[4] *People v Trapp* (*On Remand*), 280 Mich App 598 (2008). This Court denied leave to appeal in *Trapp*. 482 Mich 1044 (2008).

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

The parties' 1999 judgment of divorce obligates plaintiff ex-husband to pay defendant ex-wife $3,500 a month in spousal support. That obligation terminates "upon such time as the Defendant cohabitates with a non-related male." The term "cohabitation" was not defined in the judgment. In January 2005, plaintiff moved to terminate spousal support, alleging that defendant had been cohabiting with her partner. The trial court held an evidentiary hearing, during which defendant's partner testified that he and defendant had been in a committed relationship since December 2002. Although the couple had plans to marry, defendant told her partner that she did not want to marry or live together until her spousal support ends when her youngest child reaches the age of 18. The couple also does not share bank accounts or credit cards. Evidence was also adduced that defendant's partner used her address to receive mail from his bank and documents pertaining to his divorce. Although defendant's partner claimed that he moved into his ex-wife's home in May 2004, when he returned to Michigan from Georgia, and lived there until April 2005, his ex-wife testified that he never lived with her during that time. He also claimed that he began staying at the home he formerly shared with his ex-wife approximately three days a week beginning in April 2005, but his ex-wife observed that the minimal utility bills from their former home during that period were inconsistent with his claim. After the evidentiary hearing, the trial court identified a 1983 test for cohabitation from Ohio, found that defendant and her partner were not cohabiting, and denied plaintiff relief. On appeal, the Court of Appeals affirmed.

The Court of Appeals initially cited the three-part Ohio test used by the trial court:

> "First, there must be an actual living together, that is, the man and woman must reside together in the same home or apartment. Secondly, such a living together must be of a sustained duration. Third, shared expenses with respect to financing the residence (i.e., rent or mortgage payments) and incidental day-to-day expenses (e.g., groceries) are the principal relevant considerations." [*Smith v Smith*, 278 Mich App 198, 202 (2008), citing *Birthelmer v Birthelmer*, unpublished opinion of the Court of Appeals of Ohio for the Sixth District, issued July 15, 1983 (Docket No. L-83-046), 1983 WL 6869, *4, as affirmed and applied in *Dickerson v Dickerson*, 87 Ohio App 3d 848 (1993), and *Moell v Moell*, 98 Ohio App 3d 748 (1994).]

It also stated that "[c]ohabitation requires more than briefly living together or regularly engaging in sexual activity. Pursuant to the dictionary definition of cohabitation, the couple must be 'living together . . . as partners in life,' or 'dwelling together . . . in the manner of husband and wife.' " *Smith*, *supra* at 202-203.

II. OBJECTIONS TO THE COURT OF APPEALS ANALYSIS

The Court of Appeals ultimately adopted a totality of the circumstances test and stated that no one factor was dispositive. *Smith*, *supra* at 203-204. Nonetheless, its apparent endorsement of the Ohio test raises doubts about the standard it articulates. Proof of shared expenses, sustained duration, and a marriage-like commitment are all potentially relevant factors, but they are *not* the sine qua non in determining whether cohabitation exists. Nor do I believe that these factors amount to the "principal relevant considerations," *id*. at 202, in determining whether a couple is cohabiting.

Many dictionary definitions include the analogy to marriage that our Court of Appeals cited, see, e.g., *Merriam Webster's Online Dictionary* (11th ed) ("to live together as or as if a married couple"); Webster's New World Law Dictionary ("to live together as husband and wife, esp. when not married"); *Law.com Dictionary* ("[l]iving together in the same residence, generally either as husband and wife or for an extended period of time as if the parties were married"). Others, however, define cohabitation as merely living together in a sexual or intimate relationship, see, e.g., *Cambridge Dictionary of American English* ("(esp. of a man and woman who are not married) the act of living together"); *The Online Plain Text English Dictionary* ("[t]he living together of a man and woman in a supposed sexual relationship"); *Webster's Revised Unabridged Dictionary* (1913 ed) (same); *Wiktionary* ("[a]n emotional and physical intimate relationship which includes a common living place and which exists without legal or religious sanction"). I believe that the latter definitions provide a more accurate reflection of contemporary cohabiting arrangements.

Recent social science research suggests that the commitments of cohabiting couples are *not* equivalent to those of married couples. On the contrary, "the behaviors, understandings, and attitudes of cohabitants typically differ dramatically from those of married couples." Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal, Reconceiving the Family, Critique on the American Law Institute's Principles of the Law on Family Dissolution* (New York: Cambridge University Press, 2006), p 307. In fact, "cohabitants overwhelmingly see cohabitation as a substitute for being single, not for being married." *Id*. at 310. Moreover, Professor Garrison argues that cohabitants "do not typically follow the relational norms associated with marriage": they are "much less likely than married couples to have children together, to pool their resources, to feel secure and unconflicted in their relationships, to value commitment, or to express commitment to their partners." *Id*. at 308-309. A test that essentially equates cohabitation with common-law marriage fails to account for the significant differences between married and cohabiting couples.

Our survey of out-of-state caselaw reveals that many cases, like those cited by our Court of Appeals, define "cohabitation" in a manner that does not reflect the current reality, as documented by the social science research mentioned above. These cases view cohabitation as a substitute for marriage, and inappropriately emphasize the financial arrangements

and duration of the new relationship. See, e.g., *Rose v Csapo*, 359 NJ Super 53, 59, 62 (2002); *Pellegrin v Pellegrin*, 31 Va App 753, 767 (2000); *Konzelman v Konzelman*, 158 NJ 185, 202 (1999); *Sanders v Burgard*, 715 So 2d 808, 811-812 (Ala Civ App, 1998); *Gordon v Gordon*, 342 Md 294, 308-310 (1996); *Moell v Moell*, *supra* at 883-884.

Some courts, however, have recognized that proof of shared expenses should not be a controlling factor. In *In re Marriage of Edwards*, 73 Or App 272, 279-280 (1985), the Oregon Court of Appeals "decline[d] to adopt [the ex-]wife's suggestion that financial benefit to the supported spouse that permanently affects the need for the decreed spousal support is a prerequisite to a finding of cohabitation." It agreed with the trial court that the ex-wife was cohabiting, even though the couple had kept their finances separate. *Id*. at 275, 279. Similarly, in *Bell v Bell*, 393 Mass 20, 22-23 (1984), the Supreme Judicial Court of Massachusetts concluded that the ex-wife was living with a man "so as to give the outward appearance of marriage," and ordered the termination of alimony payments, even though the two maintained separate bank accounts and never commingled any assets.

Moreover, New York's highest court very recently reversed the finding of the intermediate appellate court that "cohabitation" had a plain meaning under New York caselaw that contemplated changed economic circumstances and required shared finances. The majority held that the term was ambiguous as used in the parties' settlement agreement because neither New York caselaw nor dictionary definitions revealed a plain meaning, and courts of other states had not uniformly defined the term. *Graev v Graev*, 11 NY3d 262, 270-271 (2008). The dissenting judge disagreed because he concluded that the inclusion of a specific period rendered the cohabitation provision unambiguous (the agreement provided that the ex-husband's maintenance obligation would terminate in the event of the ex-wife's cohabitation with an unrelated adult for a period of 60 "substantially consecutive" days). *Graev*, *supra* at 277 (Graffeo, J., dissenting). Significantly, the majority and dissent agreed that financial interdependence is *not* a sine qua non of cohabitation. The dissent stated:

> Today, as a Court, we unanimously reject the rule that economic interdependence is a *sine qua non* of cohabitation. Aside from the textual and contractual considerations, that rule makes little sense practically because a party receiving maintenance can easily evade the consequence of a termination provision and receive more than the benefit of his or her bargain. Mrs. Graev and M.P., for example, would be free to continue their relationship in its current form indefinitely without violating the termination provision—they could be together 24 hours a day and sleep together every night for years—but as long as they maintain separate bank accounts and do not share expenses, they would not be cohabitating under the economic unit concept. This is not how a cohabitation clause is supposed to work; nor is it what other

> parties anticipate when including similar cohabitation clauses in their agreements. [*Id.* at 279 (Graffeo, J., dissenting).]

The facts of this case are somewhat similar to the hypothetical situation Judge Graffeo describes. Defendant and her partner have decided to postpone marriage until her spousal support automatically expires. Defendant's partner claims to have resided with his ex-wife, then at least part-time at his former marital home, rather than with defendant, but his ex-wife's testimony about the mailing address he used and the minimal utility bills suggest that these claims were a further attempt to avoid triggering the termination provision in the parties' judgment of divorce. I share Judge Graffeo's view and the view of the *Graev* majority that a test that focuses primarily on the degree of the parties' financial interdependence does not fully capture the reality of "cohabitation" in cases like this.

I would grant leave to appeal to clarify that no single factor is dispositive under a totality of the circumstances test for cohabitation. The primary goal of the finder of fact should be to distinguish between dating relationships and cohabitation by first considering the extent to which the parties share a common residence. Courts should thus consider such factors as whether each party has keys to the residence, keeps personal items there, and uses it as a mailing address; whether the parties share household duties; and the amount of time each party spends at any separate residence. Second, courts should consider the extent to which the parties have an intimate relationship or engage in sexual relations; they need not inquire whether the couple's commitment to one another resembles a marriage. The social science data show otherwise.

Third, while courts may consider the parties' financial situation, including shared expenses and joint accounts, I would clarify that sharing expenses is not controlling. As Judge Graffeo notes in his dissent, financial interdependence is not the "*sine qua non*" of cohabitation. It is possible that one cohabiting party would pay all the expenses. I would also emphasize that the length of the parties' relationship is not dispositive.

In short, I believe that the problem posed by this case is jurisprudentially significant. I would grant leave to appeal to explore the parameters of an appropriate test for cohabitation.

Leave to Appeal Denied November 21, 2008:

TERLECKI v SILVER LAKE PROPERTY ASSOCIATION OF INDIAN RIVER, No. 136509; reported below: 278 Mich App 644.

CAVANAGH, J. I would grant leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order by the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) to deny leave to appeal in this case. I voted to grant the application for leave to appeal because I dissented from the decision of the majority of four in *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 479 Mich 378,

407-408 (2007) (WEAVER, J., dissenting) to eliminate the common-law practice of tolling accrual based on discovery.

Under *Johnson v Caldwell,* 371 Mich 368, 379 (1963), a statutory period of limitations does "not start to run until the date of *discovery, or the date, when by the exercise of reasonable care, plaintiff should have discovered the wrongful act.*" (emphasis added). Because I believe that the majority of four erred in overruling *Johnson v Caldwell*, I would grant leave to appeal in this case to consider the correctness of the decision in *Trentadue.*

KELLY, J. I join the statement of Justice WEAVER.

PEOPLE v BOADWAY, No. 136779; Court of Appeals No. 281469.

MARKMAN, J. (*concurring*). I concur in denying leave to appeal, but I write separately to address Justice KELLY's concern that the costs imposed by MCL 769.1k qualify as a "punishment."

The Ex Post Facto Clause of the Michigan Constitution, Const 1963, art 1, § 10, involves two elements: (1) whether a law is retrospective; and (2) whether it disadvantages the offender. *People v Davis*, 181 Mich App 354, 357 (1989).

First, Justice KELLY correctly notes that MCL 769.1k is retrospective. In *People v Stevenson*, 416 Mich 383, 396 (1982), this Court adopted Chief Justice Chase's often-quoted statement in *Calder v Bull*, 3 US (3 Dall) 386, 390 (1798), defining an ex post facto law:

> "1st. Every law that makes an action done before the passing of the law; and *which was innocent when done*, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, *when committed*. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, *when committed*." [Emphasis added.]

This language requires that any statute imposing additional "punishments" be enacted *after* the crime has been committed in order to constitute an ex post facto law. It is undisputed that MCL 769.1k was enacted *after* defendant committed the crimes at issue. Thus, the costs imposed pursuant to that statute are unquestionably retrospective.

Second, a statute disadvantages an offender if it "increases a punishment." *People v Harvey*, 174 Mich App 58, 60 (1989) (quotation marks and citation omitted). A punishment is a "deliberate imposition, by some agency of the state, of some measure intended to chastise, deter or discipline an offender." *People v Golba*, 273 Mich App 603, 620 (2007) (quotation marks and citation omitted). Further, in *People v Peters*, 449 Mich 515, 523 (1995), we held that "the fact that defendant . . . will experience some 'financial pain' does not transform [a] restitution order into a primarily penal sanction." *Peters* explained that restitution is meant to "cover the costs incurred" by the state, and thus is not a

primarily penal sanction. *Id*. at 524. Likewise, the imposition of "state costs" following a conviction also does not constitute a "primarily penal sanction."

MCL 769.1k mandates that, after a defendant has been convicted, "[t]he court shall impose the minimum state costs." Unlike Justice KELLY, I do not believe "minimum state costs" qualify as a "punishment." "Cost" is defined as "the price paid to acquire, produce, accomplish, or maintain anything." *Random House Webster's College Dictionary* (1991). Thus, the "minimum state costs" imposed by this statute contemplate that the defendant will bear the burden of "the price [the state] pa[ys] to acquire" a conviction or "maintain[ing]" the defendant's living conditions while in jail. Shifting the financial burden from the state to the defendant is not intended to "chastise, deter or discipline an offender." Rather, it is intended to prevent the taxpayers of this state from bearing at least some of the costs generated by the defendant's actions. Thus, "minimum state costs" do not constitute a "punishment."*

In sum, although MCL 769.1k is, in fact, retrospective in relation to defendant, the costs imposed by this statute do not constitute a punishment. As a result, there is no violation of the Ex Post Facto Clause of the Michigan Constitution.

KELLY, J. (*dissenting*). The Court should grant leave to appeal to consider whether MCL 769.1k, as applied in this case, violates the Ex Post Facto Clause of the Michigan Constitution.[1]

The test for determining whether a criminal law violates the Ex Post Facto Clause has two elements: (1) the law must be retrospective, and (2) it must disadvantage the offender.[2] A statute disadvantages an offender if (1) it makes punishable an act that was not punishable, (2) it makes the act a more serious offense, (3) *it increases a punishment,* or (4) it allows the prosecutor to convict on less evidence.[3]

It is well-settled that "[a] trial court may only require a convicted defendant to pay costs where such a requirement is expressly authorized by statute."[4] As of January 1, 2006, MCL 769.1k mandated the collection of minimum state costs under MCL 769.1j and authorized a court to impose additional costs, attorney fees, or a fine.

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* In *People v Slocum*, 213 Mich App 239 (1995), a case cited by Justice KELLY and one that has been cited by at least nine unpublished Court of Appeals opinions, the Court of Appeals held that a restitution statute authorizing the trial court to impose costs on a defendant constituted a "punishment." In doing so, it stated that "[*Peters*] determined that restitution is a form of punishment." *Id*. at 244. This seems exactly the opposite of what *Peters* held.

[1] Const 1963, art 1, § 10.

[2] *People v Davis*, 181 Mich App 354, 357 (1989), citing *Weaver v Graham*, 450 US 24, 29 (1981).

[3] *People v Moon*, 125 Mich App 773, 776 (1983).

[4] *People v Jones,* 182 Mich App 125, 126 (1989).

Defendant committed the charged offenses before the enactment of MCL 769.1k but was not prosecuted, convicted, and sentenced until after its effective date. I agree with Justice MARKMAN that a newly enacted law that increases a punishment "at any time after the crime has been committed" violates the Ex Post Facto Clause. However, I disagree with his assertion that the imposition of costs under MCL 769.1k does not qualify as a "punishment."

Justice MARKMAN's conclusion conflicts with past decisions of the Court of Appeals. In *People v Peters* (*After Remand*),[5] that court noted the punitive aspects of restitution statutes. It concluded that, because the language of the statute at issue authorized restitution "in addition to or in lieu of any other penalty,"[6] the imposition of restitution constituted a penalty.[7] MCL 769.1k similarly mandates the imposition of minimum costs but gives the court discretion to assess additional costs or fines against a defendant.

In *People v Slocum*,[8] the Court of Appeals relied on *Peters* to vacate the trial court's imposition of extradition costs on a defendant. In that case, the statute had not been amended to authorize costs until after the defendant's conviction. Its application would have increased the amount of restitution owed. After determining that the statute would apply retrospectively, the Court held that, in that case, it would violate the Ex Post Facto Clause.[9]

Finally, in *People v Pieske*,[10] the Court of Appeals vacated an order for costs under MCL 769.1k. The same statute and the same costs are involved in this case. The Court held that the imposition of costs violated the Ex Post Facto Clause because MCL 769.1k had not yet taken effect at the time that the defendant was sentenced.

Numerous Court of Appeals opinions have found Ex Post Facto Clause violations for the imposition of costs where the applicable statute was amended after a defendant committed a crime. Given the disagreement on the Court concerning this issue, we should grant leave to appeal to resolve it.

TAYLOR v TAYLOR, No. 137258; Court of Appeals No. 281555.

YOUNG, J. (*concurring*). I concur in the order denying leave to appeal. According to the record, the "lynch pin" of the trial court's decision to send the minor child to a public school was MCL 722.23(j), which considers the "willingness and ability of each of the parties to facilitate

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[5] *People v Peters* (*After Remand*), 205 Mich App 312 (1994), rev'd on other grounds 449 Mich 515 (1995).

[6] MCL 780.766(2).

[7] *Peters*, *supra* at 319.

[8] *People v Slocum*, 213 Mich App 239 (1995).

[9] *Id.* at 244.

[10] *People v Pieske,* unpublished opinion per curiam of the Court of Appeals, issued January 31, 2008 (Docket No. 273291).

and encourage a close and continuing parent-child relationship between the child and the other parent . . . ."

The record amply supports the trial court's conclusion that the two parents simply "do not communicate," and that the mother's desire to homeschool the child would result in the father being precluded from having any "say or involvement in his child's education." While regrettable, I do not view the stray remarks of the trial court, which appear to reflect a view of homeschooling as less beneficial than a public school, as altering the legitimacy or primacy of the trial court's best interests determination.

TAYLOR, C.J., and WEAVER, and CORRIGAN, JJ. We join the statement of Justice YOUNG.

MARKMAN, J. (*dissenting*). I respectfully dissent. Instead of denying leave to appeal, I would remand to the trial court for reconsideration of its order resolving the parties' dispute concerning their child's education. The trial court resolved this dispute in favor of the public schooling preferred by the father and in opposition to the homeschooling preferred by the mother. Although I take no position on the merits of the trial court's ultimate decision, I believe that the court erred by at least *appearing* to take improper factors into account in reaching this decision.

In particular, I believe that the trial court erred by *appearing* to substitute its own generally unfavorable attitudes concerning homeschooling for the public policies of this state, which accord no preference for either public schooling or homeschooling. While the trial court is entitled to its own views concerning the respective merits of these educational approaches, it is not entitled to replace the policies of Michigan with such personal views.

Here, the court concluded with regard to the parties' six-year-old daughter's educational prospects that "she doesn't seem to have a problem, I don't believe, in being able to succeed anywhere," but then terminated the daughter's homeschooling, asserting that her interests would be best served by public schooling, in which both parents could be involved. In the course of rendering this decision, the trial court made the following observations:

• Public schools would offer the child a "wider exposure" than she would receive with homeschooling.

• Public schools would offer "much more diversity, many more opportunities with respect to the things that she would be able to do."

• Although the court "appreciate[d] and respect[ed] [the mother's] desire to have a religious-based schooling, we live in a very diverse society and it is not beneficial for children to be raised in a bubble where they do not have exposure to other people's cultures and other people's religion."

• Public schooling would make the child "a more well-rounded person."

Each of these observations may or may not be true, or relevant. However, taken as a whole, they evince an attitude toward homeschooling (and public schooling) that is simply not reflected in the laws and policies of this state. Taken as a whole, these observations suggest a predisposition by the trial court that, everything else being equal, public schooling is invariably preferable to homeschooling, a predisposition that would

presumably also counsel in favor of public schooling in future disputes in which parents disagreed on approaches to their children's education.

Upon remand, I would direct the trial court to resolve the instant dispute in a manner that is not grounded on a predisposition toward either public schooling or homeschooling. I would require the trial court, as it has done with regard to the other statutory factors set forth in MCL 722.23(h), to assess the best interest of this child in terms of her *particular* educational needs. While there conceivably may be circumstances—pertaining either to the child, her parents, her parents' relationship, or the available schools—that would counsel in favor of public schooling or homeschooling in the instant case, these need to be set out with specificity and without reference to any predisposition toward either public schooling or home schooling.[1]

In re GARCIA (GARCIA v MICHIGAN CHILDREN'S INSTITUTE), No. 137485; Court of Appeals No. 284876.

Leave to Appeal Denied November 25, 2008:

ALEXANDER v BABAOFF, No. 136413; Court of Appeals No. 273433.

PEOPLE v JOSEPH CAMPBELL, No. 136512; Court of Appeals No. 271693.

PEOPLE v HARVEY-BEY, No. 136606. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284502.

PEOPLE v GAITHER, No. 136613. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280416.

PEOPLE v SUTTON, No. 136623. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280802.

PEOPLE v GARCIA-MEDINA, No. 136625. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281633.

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[1] Although it may be true, as the Court of Appeals suggests, that the trial court's decision on the child's education was "not based on a bias against home schooling," such conclusion entails speculation and conjecture in light of what was actually stated. Similarly, it is conjecture and speculation that these statements constituted mere "stray remarks," as the concurring statement asserts. If the Court of Appeals and the concurring statement are correct in these assessments, the trial court, on remand, could make this clear. I am comfortable that this matter can be remanded to the same judge for further consideration.

PEOPLE v CRAIG BROWN, No. 136635. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282496.

PEOPLE v ALBERT, No. 136646. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284019.

PEOPLE v WILKINSON, No. 136660. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282053.

PEOPLE v SUMERLIN, No. 136676. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282943.

PEOPLE v ENGDAHL, No. 136679. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284548.

PEOPLE v GEORGE MORGAN, No. 136686; Court of Appeals No. 283234.

PEOPLE v REYNALDO RODRIGUEZ, No. 136688. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284372.

PEOPLE v MCCLINTON, No. 136691. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284030.

PEOPLE v BRIDGES, No. 136698. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281102.

PEOPLE v MOTEN, No. 136710. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281335.

PEOPLE v JAMAR STERLING, No. 136713. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283940.

PEOPLE v CHRISTOPHER PIERCE, No. 136719. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283872.

PEOPLE v KALASHO, No. 136720. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284549.

PEOPLE v JAMES DAVIS, No. 136722. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284279.

PEOPLE v BLASENGAME, No. 136743. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284583.

PEOPLE v DIAZ, No. 136755. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282121.

PEOPLE v DATES, No. 136761; Court of Appeals No. 284629.

PEOPLE v GASKINS, No. 136765; Court of Appeals No. 284588.

PEOPLE v LE, No. 136766. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282786.

PEOPLE v PERSON, No. 136771. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282705.

PEOPLE v WOODFORK, No. 136772. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284941.

PEOPLE v GAYLORD WILSON, No. 136795. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282510.

PEOPLE v RICHARD LARRAIN RAYMOND, No. 136807. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282946.

PEOPLE v PNIEWSKI, No. 136808; Court of Appeals No. 284557.

PEOPLE v CONLEY, No. 136811. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282526.

PEOPLE v CASS, No. 136812. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284122.

PEOPLE v RANDALL DAVIS, No. 136825; Court of Appeals No. 285461.

PEOPLE v LOGAN, No. 136827. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284921.

PEOPLE v JOSEPH FREEMAN, No. 136828; Court of Appeals No. 272252.

PEOPLE v BUCHANAN, No. 136830; Court of Appeals No. 284934.

PEOPLE v LOCKHART, No. 136831; Court of Appeals No. 283684.

PEOPLE v LAST, No. 136838. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283504.

PEOPLE v ELLIOTT, No. 136841; Court of Appeals No. 274131.

PEOPLE v SWEET, No. 136845. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281626.

PEOPLE v HARRISON, No. 136850; Court of Appeals No. 269683.

PEOPLE v RANDY PATTERSON, No. 136853. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282132.

PEOPLE v DENNIS GLOVER, No. 136854. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283199.

PEOPLE v CHAROBEE, No. 136861. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281824.

PEOPLE v GEORGE, No. 136865. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284058.

PEOPLE v LEE, No. 136866. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285359.

PEOPLE v OSTRANDER, No. 136870. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282788.

PEOPLE v JEDYNAK, No. 136884; Court of Appeals No. 285228.

PEOPLE v CARLSON, No. 136885. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283828.

INTERNATIONAL TRANSMISSION COMPANY v PINE VIEW ESTATES SUBDIVISION ASSOCIATION, No. 136887; Court of Appeals No. 274413.

PEOPLE v HOGUE, No. 136891; Court of Appeals No. 277614.

FRENZEL v MICH-CAN, INC, No. 136894; Court of Appeals No. 281833.

PEOPLE v DAWKINS, No. 136904. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284562.

PEOPLE v ZEBADIAH HOLLAND, No. 136907. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284813.

PEOPLE v TORRES, No. 136917. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283474.

PEOPLE v BARNETT, No. 136919; Court of Appeals No. 282934.

NEWBERRY v SCADDAN, No. 136921; Court of Appeals No. 276879.

GRIWATSCH v NIEDZWIECKI, No. 136924; Court of Appeals No. 275188.

PEOPLE v TERRY MATHIS, No. 136931. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283336.

PEOPLE v FREDDY LOVE, No. 136943. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282255.

PEOPLE v JAMAL ATKINS, No. 136945. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282340.

PEOPLE v ALI, No. 136954. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281983.

PEOPLE v RALPH WILLIS, No. 136957; Court of Appeals No. 282935.

OLSEN v KARAM, No. 136960; Court of Appeals No. 277856.

ALTON v ALTON, No. 136963; Court of Appeals No. 267802.

PEOPLE v LAMBRIX, No. 136967. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284106.

PEOPLE v OWNEY, No. 136969; Court of Appeals No. 285220.

DEYO v DEYO, No. 136974; Court of Appeals No. 274311.

HALL v GREENE, No. 136979; Court of Appeals No. 276667.

PEOPLE v MICHAEL ANTHONY WILLIAMS, No. 136981. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282442.

MINGO v CITY OF DETROIT, No. 136982; Court of Appeals No. 277403.

PEOPLE v BACON, No. 136984; Court of Appeals No. 274242.

PEOPLE v BEASLEY, No. 136985; Court of Appeals No. 283970.

PEOPLE v LESTER WILLIAMS, No. 136990. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283228.

PEOPLE v TYNER, No. 136991; Court of Appeals No. 277149.

PEOPLE v NEAL, No. 136993. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284104.

PEOPLE v BARNES, No. 137003; Court of Appeals No. 282960.

PEOPLE v SEARLE, No. 137006; Court of Appeals No. 285516.

PEOPLE v MESI, No. 137008; Court of Appeals No. 284883.

PEOPLE v COTTRELL, No. 137009. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283583.

PEOPLE v ATKINSON, No. 137012; Court of Appeals No. 285365.

PEOPLE v BRENNAN, No. 137020. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283132.

PEOPLE v MESSENGER, No. 137031. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284408.

PEOPLE v HISTED, No. 137034; Court of Appeals No. 285305.

PEOPLE v MARTINEZ-CABALLARO, No. 137038. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282841.

PEOPLE v TERRY DIXON, No. 137046; Court of Appeals No. 285284.

PEOPLE v DAUGHERTY, No. 137047. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282443.

PEOPLE v BASKIN, No. 137050; Court of Appeals No. 284425.

BRYANT v BRYANT, No. 137052; Court of Appeals No. 283417.

PEOPLE v PARDEE, No. 137055. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285064.

PEOPLE v LANE, No. 137056. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285688.

PEOPLE v AMBERS, No. 137057; Court of Appeals No. 277022.

PEOPLE v TORIS, No. 137058; Court of Appeals No. 285601.

PEOPLE v WALTON, No. 137066; Court of Appeals No. 283392.

PEOPLE v JAMES BOYD, No. 137067; Court of Appeals No. 281503.

TOAZ v DEPARTMENT OF TREASURY, No. 137070; Court of Appeals No. 275784.

PEOPLE v SIMSON, No. 137074; Court of Appeals No. 271415.

PEOPLE v STRONG, No. 137075; Court of Appeals No. 276425.

PEOPLE v VANDEBERG, No. 137080; Court of Appeals No. 276080.

PEOPLE v STUDER, No. 137083; Court of Appeals No. 276296.

PEOPLE v HALLIBURTON, No. 137085; Court of Appeals No. 285538.

PEOPLE v CURB, No. 137088; Court of Appeals No. 277878.

PEOPLE v BREWSTER, No. 137089. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284449.

PEOPLE v LISA HOLLAND, No. 137090; Court of Appeals No. 275022.

PEOPLE v MCCURTIS, No. 137091; Court of Appeals No. 275999.

PEOPLE v LEEATRICE WILLIAMS, No. 137098; Court of Appeals No. 278797.

PEOPLE v RONNIE MCDONALD, No. 137099; Court of Appeals No. 285198.

PEOPLE v RONALD VERNON HARRIS, No. 137100; Court of Appeals No. 283623.

PEOPLE v BERO, No. 137104. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282974.

KELLER CONSTRUCTION, INC v U P ENGINEERS & ARCHITECTS, INC, No. 137112; Court of Appeals No. 275379.

PEOPLE v KIRSCHKE, Nos. 137114 and 137116; Court of Appeals Nos. 276126 and 277853.

SPENCER v DEPARTMENT OF CORRECTIONS, No. 137117; Court of Appeals No. 284370.

PEOPLE v TITUS JONES, No. 137118; Court of Appeals No. 284615.

PEOPLE v WILLIE HENDERSON, JR, No. 137119. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284371.

SCHUPRA v THE WAYNE OAKLAND AGENCY, No. 137120; Court of Appeals No. 277585.

SHORTER v GARNER, No. 137122; Court of Appeals No. 275149.

PEOPLE v KUCH, No. 137130; Court of Appeals No. 285263.

WIXOM MEADOWS INVESTMENTS LIMITED PARTNERSHIP v FULTON PINES DEVELOPMENT COMPANY, No. 137131; Court of Appeals No. 283538.

PEOPLE v WIDEMAN, No. 137133; Court of Appeals No. 277815.

WOLFORD v DUNCAN, No. 137135; reported below: 279 Mich App 631.

PEOPLE v EDGE, No. 137140; Court of Appeals No. 277417.

PEOPLE v ECKMYRE, No. 137141. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286109.

PEOPLE v BERNARD REED, No. 137142; Court of Appeals No. 277876.

PEOPLE v SIERADZKI, No. 137143. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 286281.

PEOPLE v GIDRON, No. 137145. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284542.

PEOPLE v TORRY TURNER, No. 137147. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285648.

PEOPLE v PENDELTON, No. 137149; Court of Appeals No. 278408.

PEOPLE v WILLETT, No. 137150. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285381.

LANE v MAGNUM CORPORATION, No. 137152; Court of Appeals No. 275939.

PEOPLE v RAMOS, No. 137154; Court of Appeals No. 285611.

PEOPLE v KIRKWOOD, No. 137158; Court of Appeals No. 277139.

PEOPLE v OUTLEY, No. 137163; Court of Appeals No. 286090.

PEOPLE v O'DELL, No. 137167; Court of Appeals No. 285520.

PEOPLE v MCDOW, No. 137169; Court of Appeals No. 278950.

PRIME FINANCIAL SERVICES LLC v VINTON, No. 137170; reported below: 279 Mich App 245.

PEOPLE v DEBERRY, No. 137171; Court of Appeals No. 284810.

PEOPLE v MOSS, No. 137172; Court of Appeals No. 278535.

WALTERS v LEECH, No. 137174; reported below: 279 Mich App 707.

HART v ANDERSON, No. 137180; Court of Appeals No. 284235.

PEOPLE v CUELLAR, No. 137181. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283620.

PEOPLE v KADE, No. 137183; Court of Appeals No. 285742.

PEOPLE v REUTHER, No. 137186. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282855.

THOMAS v FERGUSON ENTERPRISES, INC, No. 137188; Court of Appeals No. 283672.

PEOPLE v KEITH COATES, No. 137190. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285341.

PEOPLE v PATRICK BROWN, No. 137192; Court of Appeals No. 284961.

PEOPLE v CLEMENTE PENA, No. 137199. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284318.

PEOPLE v CLAXTON JOHNSON, JR, No. 137201; Court of Appeals No. 277571.

PEOPLE v MATTHISEN, No. 137204; Court of Appeals No. 283679.

KRAUSE v GRACE COMMUNITY CHURCH, No. 137210; Court of Appeals No. 276173.

PEOPLE v MOREHEAD, No. 137216; Court of Appeals No. 277176.

PEOPLE v PEGENAU, No. 137224; Court of Appeals No. 285457.

In re ESTATE OF FINK (POST v SCHULTZ), No. 137225; Court of Appeals No. 278266.

MURRAY v COMSTOCK PUBLIC SCHOOLS, No. 137226; Court of Appeals No. 283528.

PEOPLE v MONTES, No. 137230; Court of Appeals No. 277211.

PEOPLE v CHRISTOPHER BOYD, No. 137231; Court of Appeals No. 286045.

PEOPLE v BURROWS, No. 137239; Court of Appeals No. 278319.

PEOPLE v BUGGS, No. 137240. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284185.

PEOPLE v MCCOWAN, No. 137242; Court of Appeals No. 278794.

PEOPLE v BACHYNSKI, No. 137245; Court of Appeals No. 285403.

MAC v NORTHWEST AIRLINES, INC, No. 137246; Court of Appeals No. 282759.

SHOPE v A D TRANSPORT EXPRESS, INC, No. 137247; Court of Appeals No. 284276.

PEOPLE v PUFALL, No. 137250; Court of Appeals No. 285937.

PEOPLE v PAYNE, No. 137260; Court of Appeals No. 273233.

PEOPLE v NUNN, No. 137265; Court of Appeals No. 278274.

PEOPLE v CURTIS CLARK, No. 137275; Court of Appeals No. 285986.

PEOPLE v BLISS, No. 137279; Court of Appeals No. 286737.

PEOPLE v FALCONE, No. 137281; Court of Appeals No. 285871.

PEOPLE v BRIAN WILLIAMS, No. 137283; Court of Appeals No. 285973.

PEOPLE v LAMPMAN, No. 137286; Court of Appeals No. 283168.

PEOPLE v KADE, No. 137291; Court of Appeals No. 285733.

PEOPLE v KEITH, No. 137302; Court of Appeals No. 278573.

PEOPLE v BRULEY, No. 137303; Court of Appeals No. 286348.

PEOPLE v WINKLER, No. 137308; Court of Appeals No. 278499.

PEOPLE v KLAASSEN, No. 137309; Court of Appeals No. 286581.

PEOPLE v REESE, No. 137310; Court of Appeals No. 285933.

PEOPLE v INSCO, No. 137312; Court of Appeals No. 277696.

PEOPLE v MARK WHITE, No. 137316; Court of Appeals No. 283421.

PEOPLE v HURD, No. 137317; Court of Appeals No. 278618.

PEOPLE v GARRY YOUNG, No. 137319; Court of Appeals No. 286284.

AMERITECH PUBLISHING, INC v DEPARTMENT OF TREASURY, No. 137322; Court of Appeals No. 276374.

PEOPLE v SHELTON WILLIAMS, No. 137325; Court of Appeals No. 286088.

PEOPLE v HERNANDEZ, No. 137331; Court of Appeals No. 286304.

PEOPLE v PORTER, No. 137333; Court of Appeals No. 286532.

PEOPLE v ANTHONY WILLIAMS, No. 137336; Court of Appeals No. 284229.

MICHIGAN NON-PROFIT HOUSING CORP v MATTHEWS, No. 137339; Court of Appeals No. 285451.

PEOPLE v BLOOMFIELD, No. 137340; Court of Appeals No. 286166.

PEOPLE v CHARLES SMITH, III, No. 137341; Court of Appeals No. 286383.

PEOPLE v TIMOTHY KELLEY, No. 137350; Court of Appeals No. 284872.

PEOPLE v GLEASON, No. 137361; Court of Appeals No. 284696.

PEOPLE v SANDIFER, No. 137368; Court of Appeals No. 287030.

PEOPLE v TOMASELLO, No. 137376; Court of Appeals No. 285654.

MCMILLIAN v DTE ENERGY, No. 137378; Court of Appeals No. 286371.

PEOPLE v PLAIR, No. 137394; Court of Appeals No. 274575.

PEOPLE v OLIVER, No. 137396; Court of Appeals No. 276824.

PEOPLE v BRISBANE, No. 137428; Court of Appeals No. 277365.

KENDALL v STATE BAR OF MICHIGAN, No. 137442; Court of Appeals No. 277330.

Reconsiderations Denied November 25, 2008:

PEOPLE v RAYMOND GRAY, No. 135901. Leave to appeal denied at 482 Mich 971. Court of Appeals No. 282552.

PEOPLE v JEFFREY BROWN, No. 136085. Leave to appeal denied at 482 Mich 988. Court of Appeals No. 279572.

PEOPLE v BILLY POWELL, No. 136142. Leave to appeal denied at 481 Mich 925. Court of Appeals No. 282376.

Appeal Dismissed November 25, 2008:

PEOPLE v GIVENS, No. 136816. On order of the Court, on receipt of notice that the defendant died during the pendency of the appeal, the Court, on its own motion, dismisses the application for leave to appeal as moot. Court of Appeals No. 278600.

Summary Dispositions November 26, 2008:

PEOPLE v SAM, No. 136756. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate defendant's plea-based conviction of operating a motor vehicle while under the influence of intoxicating liquor-third offense (OUIL 3rd), MCL 257.625(1), (9)(c), because the prosecution concedes that it could not have prosecuted defendant for this offense under the statute as it was written at the time of defendant's offense. See *People v New,* 427 Mich 482, 491-492 (1986); *People v Hammond,* 187 Mich App 105, 110-113 (1991). We note that the November 29, 2007, judgment of sentence reflects a plea to the original charge of operating while intoxicated, causing serious impairment of a body function of another person, MCL 257.625(5); the discrepancy between the judgment of sentence and defendant's actual plea to OUIL 3rd appears to have been the result of a clerical error. We reinstate the original charge of operating while intoxicated, causing serious impairment of a body function of another person, MCL 257.625(5), and remand this case to the Wayne Circuit Court for trial or for further proceedings consistent with this order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 285016.

PEOPLE v BLACK, No. 136840. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for the correction of the sentencing information report (SIR) to reflect the circuit court's changes made at the sentencing proceeding on

August 22, 2007. MCR 6.425(E)(2). The circuit court shall forward a copy of the amended SIR to the Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 284928.

KELLY, J. I would vacate the judgment of sentence and remand this case to the trial court for resentencing in accordance with the terms of the sentence agreement, under *People v Cobbs*, 443 Mich 276 (1993), to a minimum term at the bottom of the appropriate guidelines range, or, in the alternative, for the defendant to be given the opportunity to withdraw his pleas.

FORD V SECURECARE, INC, No. 136935. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Washtenaw Circuit Court for entry of an order granting defendants' motion for summary disposition with prejudice in light of *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007), and *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412 (2007) (holding that a successor personal representative is barred by res judicata from filing a subsequent complaint when the first was dismissed on statute of limitations grounds). We do not retain jurisdiction. Court of Appeals No. 266272.

PEOPLE V DEVON HOWARD, Nos. 137683 and 137685. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted to determine whether the trial court followed the standards set forth in MCR 6.201(C)(2) and *People v Stanaway*, 446 Mich 643 (1994), in granting an in camera review of privileged materials. The proceedings in the Oakland Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals Nos. 288723 and 288724.

Leave to Appeal Denied November 26, 2008:

PEOPLE V MCGHEE, No. 130031; reported below: 268 Mich App 600.

PEOPLE V BONNEY, No. 135013; Court of Appeals No. 279468.

PEOPLE V RICHARD LEE RAYMOND, No. 136734; Court of Appeals No. 283502.

KELLY, J. I would reverse the Macomb Circuit Court revocation of the order of probation and remand this case to the trial court for further proceedings, because there was no provision in the order of probation that prohibited the defendant from being within 500 feet of the victim, so probation could not be revoked for that reason. Furthermore, expanding the "no contact" provisions beyond those listed in the order of probation without notice to the defendant violated due process. See *United States v Twitty*, 44 F3d 410 (CA 6, 1995).

ADAMASU v GIFFORD, KRASS, GROH, SPRINKLE, ANDERSON & CITKOWSKI, PC, No. 136748; Court of Appeals No. 273895.

UNIVERSITY OF MICHIGAN REGENTS v TITAN INSURANCE COMPANY, No. 136905; Court of Appeals No. 276710.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

VANERIAN v CHARLES L PUGH COMPANY, INC, No. 137048; reported below: 279 Mich App 431.

Summary Dispositions December 3, 2008:

SCOTT v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 136502. The motion for leave to file a brief amicus curiae is granted. The application for leave to appeal the April 15, 2008, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that stated that, with respect to the causation test under MCL 500.3105(1), "almost any causal connection or relationship will do." *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313-314 (1979), and *Bradley v Detroit Automobile Inter-Ins Exch*, 130 Mich App 34, 42 (1983). To the extent of that description of the required causal connection, those cases are inconsistent with the other authorities relied on by the Court of Appeals, such as *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 634 (1997), *Thornton v Allstate Ins Co*, 425 Mich 643, 659 (1986), and *Kochoian v Allstate Ins Co*, 168 Mich App 1 (1988). In all other respects, the application for leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. Reported below: 278 Mich App 578.

MARKMAN, J. (*concurring*). Contrary to the dissent, our order does not "alter" Court of Appeals precedent. Even apart from the fact that *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307 (1979), and *Bradley v Detroit Automobile Inter-Ins Exch*, 130 Mich App 34 (1983), are both nonbinding under MCR 7.215(J)(1), these decisions predate both *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997). In both *Thornton* and *Putkamer*, this Court adopted only the "incidental, fortuitous, or but for" language, not the "almost any causal connection will do" language, of the Court of Appeals decisions. It seems clear that if this Court had intended to include the latter language in the test under MCL 500.3105(1), it would have been natural to have done so in either or both *Thornton* and *Putkamer*. We did not. Therefore, the *only* test under which the Court of Appeals was obligated to evaluate this case was the one set forth in *Thornton* and *Putkamer*.

That the two tests could conceivably be construed together, as the dissent suggests, is irrelevant. This Court has an obligation to make certain that the tests under which we evaluate cases are as reasonably clear as possible to the parties and lower courts. We have never adopted the "almost any causal connection" language and cannot permit the Court of Appeals to alter our statements concerning the law with

published references to nonbinding precedents that we have never seen fit to adopt and indeed have implicitly rejected. By leaving the "almost any causal connection" language unaddressed, we distort the clear (and I believe correct) rule set forth in *Thornton* and *Putkamer*.

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

CAVANAGH, J. I would deny leave to appeal without the further statement found in the majority's order.

KELLY, J. (*dissenting*). I would grant leave to appeal. This case involves an interlocutory appeal by defendant, State Farm Mutual Automobile Insurance Company, from the probate court's denial of summary disposition. Plaintiff's claim was made under the no-fault insurance act,[1] and the issue on appeal is the level of causation required to support a claim under the act.

Plaintiff was injured in an automobile accident in 1981 that left her impaired and legally incapacitated. Because of skeletal and brain trauma from the accident, she has been unable to lead a normal active life and, as a result, has gained some 80 pounds.[2] This, in turn, has caused her cholesterol to skyrocket, causing hyperlipidemia, and she now requires medication to control it. Defendant State Farm originally paid for plaintiff's medication, but has now terminated her benefits.[3] Plaintiff sued to reinstate the benefits, and when State Farm moved to dismiss her case, the probate court denied the motion. The circuit court denied leave to appeal, and the Court of Appeals affirmed the probate court's decision in a published opinion per curiam.[4]

This Court has now partially vacated the Court of Appeals opinion. In so doing, the majority has overturned a line of Michigan caselaw that has existed and been followed since 1979. It concerns the threshold level of causation plaintiffs must establish to proceed in no-fault cases. Existing law states that evidence establishing "almost any causal connection will do," as the Court of Appeals indicated. The causal connection must also be "more than incidental, fortuitous or but for."

Contrary to the majority's conclusion, the cases cited by the Court of Appeals addressing causation are mutually compatible. As the Court of Appeals held in *Kangas v Aetna Casualty & Surety Co*:[5]

> [W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which *causal connection is more than incidental, fortuitous or but for*. [Emphasis added.]

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[1] MCL 500.3101 *et seq*.

[2] She weighed 120 pounds before the accident.

[3] State Farm's own independent medical examiner acknowledged a causal link between plaintiff's hyperlipidemia and the automobile accident.

[4] *Scott v State Farm Mut Automobile Ins Co*, 278 Mich App 578 (2008).

[5] *Kangas v Aetna Casualty & Surety Co,* 64 Mich App 1, 17 (1975).

Four years later, the Court of Appeals, in *Shinabarger v Citizens Mut Ins Co*,[6] again examined the causation element of no-fault insurance claims:

> The term "arising out of" does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused by the use of the vehicle . . . . [*A*]*lmost any causal connection or relationship will do* . . . . [T]he injury need not be the proximate result of "use" in the strict sense, but it cannot be extended to something distinctly remote. Each case turns on its precise individual facts. The question to be answered is whether the injury "originated from", "had its origin in", "grew out of", or "flowed from" the use of the vehicle. [Citations and quotation marks deleted; emphasis added.]

In 1983, in *Bradley v Detroit Automobile Inter-Ins Exch,*[7] the Court of Appeals relied on language from *Shinabarger*, stating that " 'almost any causal relationship or connection will do.' " However, *Bradley* also quoted the *Kangas* holding that " 'there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for.' "[8] Note that *Bradley* used both the *Kangas* and *Shinabarger* standards, indicating they are compatible.

In *Thornton v Allstate Ins Co,* this Court repeated the "incidental, fortuitous, or but for" language of *Kangas*.[9] *Thornton* did not discuss the "almost any causal connection will do" language. Recently, in *Putkamer v Transamerica Ins Corp of America*,[10] this Court affirmed that the causal connection between an injury and the use of the motor vehicle must be more than incidental, fortuitous, or "but for."

The Court of Appeals did not err in relying on these cases to interpret the causal nexus required in a no-fault case involving injury. The precedent makes clear that an injury requires more than a fortuitous, incidental or but-for causal connection, but does not require full proximate causation. Also, as *Bradley* states, "almost any causal connection will do." Nothing suggests that the two standards are in opposition or cannot be applied together. They logically build on one another and stand for the same basic proposition. Taken together, they mean that evidence establishing almost any causal connection will suffice when it is more than merely fortuitous, incidental, or but for. The level of proof could be described as a scintilla of proximate cause. The Court in *Bradley* recognized this when it cited both standards to render its decision, just as the Court of Appeals did in this case.

The Michigan Supreme Court should not alter the precedent concerning this issue without first hearing oral argument and inviting briefing

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[6] *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313-314 (1979).

[7] *Bradley v Detroit Automobile Inter-Ins Exch,* 130 Mich App 34, 42 (1983).

[8] *Id.* at 41-42.

[9] *Thornton v Allstate Ins Co,* 425 Mich 643, 659-660 (1986).

[10] *Putkamer v Transamerica Ins Corp of America,* 454 Mich 626, 634 (1997).

on it. State Farm argues that the sky will fall if the standard used by the Court of Appeals is not revised. Yet, the sky has remained in place under the existing standard for the last 30 years.

Rather than alter this important standard hastily, the Court should grant leave to appeal and make a change, if any, only after due deliberation.

WEAVER, J. I join the statement of Justice KELLY.

PEOPLE v DELAZZER, No. 136889. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Jackson Circuit Court for resentencing in light of *People v Smith*, 482 Mich 292 (2008). Court of Appeals No. 277834.

CORRIGAN, J. (*concurring*). I concur in the order of remand in light of the majority opinion in *People v Smith,* 482 Mich 292 (2008). But, as explained in my dissent in *Smith,* I continue to find the majority rule unworkable and worthy of reconsideration.

WEAVER, J. (*dissenting*). I would deny leave to appeal for the reasons set forth in my dissenting statement in *People v Smith*, 482 Mich 292, 325-329 (2008).

Leave to Appeal Granted December 3, 2008:

SEYBURN, KAHN, GINN, BESS, DEITCH, AND SERLIN, PC v BAKSHI, No. 136436. The parties shall include among the issues to be briefed: (1) whether the plaintiff's action was brought to recover the balance due upon a mutual and open account; (2) if so, whether MCL 600.5831 applies to an action brought by an attorney against his client to recover unpaid legal fees; (3) whether legal services performed after termination of an attorney-client relationship can be "the last item proved in the account" under MCL 600.5831; (4) whether there can be a "mutual and open account" after termination of an attorney-client relationship; and (5) whether a claim by an attorney against his client for unpaid legal fees always accrues on the date the attorney-client relationship ends.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 278 Mich App 486.

Leave to Appeal Denied December 3, 2008:

In re SOUTHARD (DEPARTMENT OF HUMAN SERVICES v SOUTHARD), Nos. 137487, 137488, 137489, 137491, and 137492; Court of Appeals Nos. 283599, 283600, 283601, 283602, and 283603.

EMPSON-LAVIOLETTE v CRAGO, No. 137537; reported below: 280 Mich App 620.

In re SEGAR (DEPARTMENT OF HUMAN SERVICES v SEGAR), No. 137594; Court of Appeals No. 284817.

Leave to Appeal Denied December 10, 2008:

PEOPLE v HORTON, No. 134969; Court of Appeals No. 268264.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HELLSTROM, No. 135382; Court of Appeals No. 269980.

PEOPLE v SCHULTZ, No. 136790; reported below: 278 Mich App 776.

PEOPLE v BERNAICHE, No. 136995; Court of Appeals No. 261498.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v SCHURTZ, Nos. 136996 and 136997; Court of Appeals Nos. 278056 and 278057.

ABE v MICHIGAN STATE UNIVERSITY, No. 136999. Costs of $250 are assessed against the plaintiff in favor of the defendant under MCR 7.316(D)(1) for filing a vexatious appeal. Plaintiff Shola Abe is barred from submitting additional filings in this Court in noncriminal matters until he offers proof that he has paid all outstanding court-imposed sanctions. Court of Appeals No. 281651.

PEOPLE v PLATTE, No. 137011; Court of Appeals No. 282046.

KELLY, J. (*dissenting*). I would grant leave to appeal. Appellate counsel concededly missed the deadlines for filing a motion for a new trial and for a claim of appeal. Counsel also failed to file a motion for a stay or to remand in the Court of Appeals. When counsel filed an application for leave to appeal, it was denied. The Court should reexamine its practice of requiring a defendant to show prejudice in order to have an appeal as of right if counsel has been ineffective, as here. *People v Pickens*, 446 Mich 298 (1994).

Finally, I would grant leave to appeal in this case for the reasons stated in my dissent in *People v Conway,* 474 Mich 1140 (2006).

PEOPLE v BROCKMAN, No. 137033; Court of Appeals No. 284456.

KELLY, J. I would remand this case for resentencing.

Summary Disposition December 11, 2008:

ANGLERS OF THE AUSABLE, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 137725. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall consider on remand (1) whether the Otsego Circuit Court erred in finding that defendant Merit's Certificate of Coverage exceeded the scope of the Department of Environmental Quality's July 23, 2004, General Permit; (2) whether, by analyzing defendant Merit's Certificate of Coverage under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*, the Otsego Circuit Court's ruling of January 31, 2008, exceeded the proper scope of review of an administrative ruling; and, if not, (3) whether the Otsego Circuit Court erred in basing its MEPA ruling on the factual record developed in the parties' separate circuit court action. *Human Rights Party v Corrections Comm*, 76 Mich App 204 (1977). We note that there

are related cases pending in the Court of Appeals. Docket Nos. 279301, 279306, 280265, and 280266. Court of Appeals No. 284315.

CAVANAGH, WEAVER, and KELLY, JJ. We would deny leave to appeal.

Summary Disposition December 12, 2008:

GRIEVANCE ADMINISTRATOR v COOPER, No. 135053. In lieu of granting leave to appeal, we reverse the opinion and order of the Attorney Discipline Board and reinstate the August 1, 2006, order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. The Attorney Discipline Board erred in holding that the July 29, 2002, fee agreement was ambiguous as to whether the $4,000 minimum fee was nonrefundable. As written, the agreement clearly and unambiguously provided that the respondent was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the agreement nor the respondent's retention of the minimum fee after the client terminated the representation violated existing MRPC 1.5(a), MRPC 1.15(b), or MRPC 1.16(d). ADB: 06-000036-GA.

KELLY, J. (*concurring*). I concur in the Court's order reversing the opinion and order of the Attorney Discipline Board and reinstating the order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. I write separately in the interest of curtailing future misunderstandings regarding attorney-client fee agreements similar to the one that occurred in this case.

The following is the relevant part of the fee agreement:

> 1. Client agrees to pay Attorney a MINIMUM FEE OF $4,000.00 which shall be payable as follows:
>
> Retainer $4,000.00
>
> Balance $-0-
>
> * * *
>
> This MIMIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below.
>
> 2. Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.
>
> 3. Hourly rate: Attorney $195.00
>
> Assistant $_____
>
> 4. In the event the combined Attorney and Legal Assistant time shall exceed the MINIMUM FEE, Client agrees to pay for such time at the rates set forth in Paragraph 3 above.

I agree that this agreement is unambiguous because it clearly states that the $4,000 minimum fee is nonrefundable.

However, counsel might be aided in knowing that the Attorney Grievance Commission believes that fewer grievances would be filed if a different fee agreement were substituted for the agreement used in this case. The commission recommends that the agreement explicitly designate the fee the attorney charges for being hired and state that the fee is nonrefundable under any circumstances. As the commission recommends, counsel may wish to designate the number of hours the attorney will work without additional charge, and specify an hourly rate to be charged thereafter.

GENERAL MOTORS CORPORATION v ALUMI-BUNK, INC, No. 135117. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we hereby reverse in part the July 24, 2007, judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion. The trial court did not err in granting the defendants' motion for summary disposition on the plaintiff's claim of fraudulent inducement. Therefore, the ruling of the Wayne Circuit Court is affirmed in all respects. Court of Appeals No. 270430.

YOUNG, J. (*concurring*). I concur with the Court's order to reverse the Court of Appeals resolution of the fraudulent inducement claim. I write separately to indicate that, contrary to Justice KELLY's dissenting statement, the tort claim raised in this case is clearly barred by the economic loss doctrine because it is inextricably interwoven with plaintiff's claim of breach of contract.

The alleged basis for the contract was defendant's promise to "upfit" (modify) the vehicles it purchased from plaintiff in exchange for a discounted price. Contrary to Justice KELLY's analysis, this singular "promise" is the *sole* reason for the dispute between the parties. Indeed, a reader will be hard-pressed to find a distinction between the two complaint averments that Justice KELLY quotes in support of her dissenting statement.

Plaintiff claims that defendant made this upfit promise during the negotiation phase, but it was never made a part of the contract. Nevertheless, plaintiff contends that defendant breached its promise to upfit the vehicles it purchased and that defendant never intended to upfit when it promised to do so. Thus, this promise to upfit is both the basis for the breach of contract claim and the fraudulent inducement claim.

The trial court and the Court of Appeals correctly determined that plaintiff's breach of contract claim, based on the violation of this promise, must be dismissed given that plaintiff failed to include this central term in the written contract. Moreover, there is no way to characterize these identical allegations as separate claims for breach of contract and fraudulent inducement. Accordingly, the trial court was required, as it did, to dismiss the fraud claim to prevent contract law from "drown[ing] in a sea of tort." *Neibarger v Universal Coop, Inc*, 439 Mich 512, 531 (1992). The Court of Appeals erred in reversing that decision.

KELLY, J. (*dissenting*). I respectfully dissent from the Court's order reversing in part the judgment of the Court of Appeals. I believe that the Court of Appeals majority correctly held that defendants are not entitled

to summary disposition on the fraudulent inducement of plaintiff, General Motors Corporation. Accordingly, I would affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2003, defendants sought to purchase hundreds of pickup trucks from a General Motors Corporation (GMC) dealer. Defendants ultimately purchased 148 trucks and obtained from plaintiff a Competitive Assistance Program (CAP) discount of $7,200 for each vehicle. Plaintiff contends that it granted the discount only because defendants agreed, both orally and in writing, to modify or "upfit" the vehicles before selling them. In this way, the vehicles would not compete with other, unmodified, GMC vehicles already on the market. However, the written contract contained no such requirement and defendants later sold the vehicles without modifications.

Plaintiff filed a complaint setting forth counts of negligent, innocent, and/or intentional misrepresentation, fraud, and breach of contract, among others. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiff's claims were untenable because the written contract memorializing the CAP discount did not contain a requirement that the vehicles be upfitted. Defendants also argued that the economic loss doctrine[1] applied to this case and barred plaintiff's tort claims. Also, it asserted, plaintiff was limited to the remedies available under the Uniform Commercial Code[2] (UCC). Plaintiff responded that the economic loss doctrine was inapplicable to plaintiff's fraudulent inducement claim, and, even if applicable, the claim remained viable because the fraud occurred before the contract existed.

The trial court granted defendants' motion for summary disposition, ruling that the fraud claim was not independent of the contract claim and was thus barred by the economic loss doctrine. The Court of Appeals majority affirmed in part and reversed in part, finding no error in the trial court's conclusion that the economic loss doctrine governed because "the contract regarding the CAP discount involved the conducting of business concerning trucks, which are 'goods' under the UCC."[3] However, the Court held that the trial court erred in concluding that the alleged fraud was so interwoven with the breach of contract claim that it could not be considered separately.[4] The Court concluded that outstanding questions of fact existed regarding the fraud claim. It referred to

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[1] The economic loss doctrine provides that "[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." *Neibarger v Universal Coop, Inc*, 439 Mich 512, 520 (1992) (citations and quotation marks omitted).

[2] MCL 440.1101 *et seq*.

[3] *Gen Motors Corp v Alumi-Bunk, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 270430), at 4.

[4] *Id*. at 7.

credible evidence that defendants had improperly induced plaintiff to enter into the contract by agreeing to upfit the vehicles without having a present intent to do so.[5]

We granted leave to appeal to determine (1) whether an exception to the economic loss doctrine exists for claims of fraudulent inducement, and (2) whether the fraud claims in this case are sufficiently distinguishable from the contract claims for purposes of applying the fraudulent inducement exception.[6]

II. ANALYSIS

This Court officially recognized the economic loss doctrine in *Neibarger v Universal Coop, Inc*.[7] *Neibarger* involved a plaintiff seeking economic loss damages as the result of a defective product. Commenting on the differences between an individual consumer's tort remedy for product liability compared with a commercial party suffering economic losses, the Court stated:

> [I]n a commercial transaction, the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers and limitations of remedies. Where a product proves to be faulty after the parties have contracted for sale and the only losses are economic, the policy considerations supporting products liability in tort fail to serve the purpose of encouraging the design and production of safer products.[8]

The Court went on to hold that "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC . . . ."[9]

The *Neibarger* Court also noted the policy rationale behind the economic loss doctrine:

> The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e. the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles . . . are better suited for resolving claims involving unanticipated physical injury . . . . Contract principles, on the other hand, are generally more appropriate for determining claims for

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[5] *Id*. at 7-8.

[6] *Gen Motors Corp v Alumi-Bunk, Inc*, 480 Mich 1193 (2008).

[7] *Neibarger v Universal Coop, Inc*, 439 Mich 512 (1992).

[8] *Id*. at 523.

[9] *Id*. at 527-528.

> consequential damages that the parties have, or could have, addressed in their agreement.[10]

MCL 440.1103 provides the basis for plaintiff's assertion that there is an exception to the economic loss doctrine for claims of fraud:

> Unless displaced by the particular provisions of [the UCC], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, *fraud*, *misrepresentation*, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall *supplement its provisions*.[11]

Huron Tool & Engineering Co v Precision Consulting Services, Inc,[12] is the leading case discussing the fraudulent inducement exception to the economic loss doctrine.[13] *Huron Tool* involved the defendant manufacturer's claims for breach of contract, breach of warranty, fraud, and misrepresentation arising out of defective software purchased by the plaintiff. After determining that the plaintiff's breach of contract claim was barred by the UCC's statute of limitations, the Court of Appeals addressed the viability of the plaintiff's fraudulent inducement claim:

> With regard to the specific intentional tort of fraud, courts generally have distinguished fraud in the inducement as the only kind of fraud claim not barred by the economic loss doctrine. We believe this distinction is warranted in light of the rationale of the economic loss doctrine.
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> * * *
>
> In light of this rationale, we decline to adopt defendants' position that the economic loss doctrine precludes *any* fraud claim.

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[10] *Id*. at 521 (quotation marks and citation omitted).

[11] Emphasis added.

[12] *Huron Tool & Engineering Co v Precision Consulting Services, Inc,* 209 Mich App 365 (1995).

[13] Numerous jurisdictions have relied on *Huron Tool* for the proposition that an exception to the economic loss doctrine exists for claims of fraudulent inducement. See, e.g., *Werwinski v Ford Motor Co*, 286 F3d 661, 676 (CA 3, 2002); *Marvin Lumber & Cedar Co v PPG Industries, Inc*, 223 F3d 873, 885 (CA 8, 2000); *Giles v Gen Motors Acceptance Corp*, 494 F3d 865, 875 (CA 9, 2007); *Dinsmore Instrument Co v Bombardier, Inc*, 999 F Supp 968, 970 (ED Mich, 1998); *Kaloti Enterprises, Inc v Kellogg Sales Co*, 283 Wis 2d 555, 581 (2005); *Valleyside Dairy Farms, Inc v AO Smith Corp*, 944 F Supp 612, 616 (WD Mich, 1995).

> Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely—which normally would constitute grounds for invoking the economic loss doctrine—but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior.[14]

The Court of Appeals limited its holding, however, stating that "a plaintiff may only pursue a claim for fraud in the inducement extraneous to the alleged breach of contract.[15]

Applying the principles expounded in *Neibarger*, MCL 440.1103, and *Huron Tool* to this case, it is clear that the majority's decision to reverse the Court of Appeals and grant summary disposition to defendants is unwarranted. This case involves a "transaction in goods." The UCC thus provides the relevant governing law,[16] and the economic loss doctrine would generally bar claims for economic loss related to the transaction, including breach of contract claims.[17] However, MCL 440.1103 explicitly recognizes that certain categories of claims are exempt from the economic loss doctrine. Specifically, claims for fraud are authorized by statute as a supplement to the remedies normally available under the UCC.[18] This is the premise that governs this dispute.

Moreover, as recognized in *Huron Tool*, fraudulent inducement claims are proper despite the limitations of the economic loss doctrine "where parties to a contract appear to negotiate freely . . . but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior."[19] *Huron Tool* addressed claims of fraud interwoven with claims of breach of contract. It held that, in such claims, the alleged misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.[20] This type of fraud is not extraneous to the contractual dispute between the parties. It is another thread in the fabric of plaintiff's contract claim, supported by factual allegations identical to those supporting its breach of contract counts.[21] Such fraud

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[14] *Huron Tool, supra* at 371-373 (emphasis in original).

[15] *Id*. at 374.

[16] MCL 440.2102.

[17] *Neibarger*, *supra* at 520. The issue whether the trial court properly dismissed plaintiff's breach of contract claims is not the subject of this appeal.

[18] MCL 440.1103.

[19] *Huron Tool*, *supra* at 372.

[20] *Id*. at 373.

[21] *Id*.

does not induce a plaintiff to enter into a contract nor does it cause harm to a plaintiff distinct from that caused by the breach of contract.[22]

As determined by the Court of Appeals majority in the instant case, the fraud alleged by plaintiff was not interwoven with its breach of contract claim. Rather, the alleged fraud induced plaintiff to enter into the contract; it did not relate to the breach of contract itself. In fact, plaintiff's complaint specifically alleges, in pertinent part:

> FRAUD
>
> 32. Defendants . . . *knowingly misrepresented* that any fleet vehicles purchased under the Competitive Assistance Program *would be upfitted* before the resale of those vehicles to the general public. . . .
>
> * * *
>
> NEGLIGENT, INNOCENT AND/OR INTENTIONAL MISREPRESENTATION
>
> 39. Defendants . . . *represented to [plaintiff]* on several occasions that any fleet *vehicles* purchased under the Competitive Assistance Program *would be upfitted* before the resale of those vehicles to the public.[23]

Plaintiff's complaint thus makes clear that its fraud and misrepresentation claims are not based on a breach of the contract itself. They are based, instead, on defendants' representations made before the contract was executed. Accordingly, the Court of Appeals correctly distinguished the two intrinsically different allegations of misconduct by defendant—fraudulent inducement and breach of contract—in holding that defendants are not entitled to summary disposition.

This analysis is also consistent with the Court's holding in *Rutan v Straehly*.[24] In *Rutan*, the Court held that fraud claims generally cannot be predicated on future actions. However, the Court stated that "an unfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform.[25] I agree with the Court of Appeals majority, which relied on *Rutan.* The Court concluded that plaintiff presented ample evidence of an unfulfilled promise to perform on the part of defendants. It presented ample evidence that, while defendants agreed to upfit the vehicles, defendants had a present intent to sell the vehicles without doing so. This

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[22] *Id*.

[23] Plaintiff's complaint at 7, 9 (emphasis added).

[24] *Rutan v Straehly,* 289 Mich 341 (1939).

[25] *Id*. at 348-349.

situation fits squarely within *Rutan*, MCL 440.1103, the fraudulent inducement exception to the economic loss doctrine, and *Huron Tool*.

The majority's reliance on the Court of Appeals dissent is unfounded. The dissent misapplies *Huron Tool* and ignores the import of MCL 440.1103 and *Rutan*.[26] The dissenting opinion correctly states that, pursuant to *Huron Tool*, a plaintiff must allege a claim for fraudulent inducement separate from a claim of breach of contract. However, it disregards documentary and testimonial evidence presented by plaintiff that during the negotiating process, defendants made several misrepresentations, both written and oral, that the purchased vehicles would be upfitted. Therefore, the dissenting opinion's statement that "there is a glaring absence of any evidence at all that would even inferentially support [plaintiff's claim for fraudulent inducement]" is inaccurate.[27]

Similarly, *Huron Tool* evinces no intent to subvert the foundational rule of Michigan jurisprudence, embodied in MCR 2.111(A)(2), that a party may plead in the alternative even "where proof of one claim must defeat the existence of another."[28] A plaintiff's "antithetical pleadings" are not grounds for summary judgment.[29] Thus, the fact that plaintiff pleaded alternate theories of liability flowing from the same facts—fraudulent inducement and breach of contract—does not support a rejection of its fraudulent inducement claim. The proper scope of analysis under *Huron Tool* is the fraud claim itself, as stated in plaintiff's complaint. That claim should be analyzed to determine if it relates to a contractual provision or to the separate breach of contract theory of liability alleged in the complaint. If it relates to a contractual provision, the economic loss doctrine bars the fraud claim. If not, the claim survives on its own.

It is undisputed that the contract at issue has no provision for upfitting. Hence, plaintiff's fraudulent inducement claim does not relate to a contractual provision, and the claim should proceed. Speculation about whether plaintiff should have included an upfit provision in the contract is an issue involving the contract, wholly irrelevant to the fraudulent inducement claim.

III. CONCLUSION

I believe that the Court of Appeals majority correctly held that defendants are not entitled to summary disposition on plaintiff's claims for fraudulent inducement. Pursuant to MCL 440.1103, *Huron Tool,* and

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[26] In fact, Justice YOUNG's concurrence and the Court of Appeals dissent both fail to cite MCL 440.1103 or *Rutan*. Justice YOUNG also fails to recognize the significance of *Huron Tool* whatsoever.

[27] *Gen Motors Corp v Alumi-Bunk, Inc,* unpublished Court of Appeals dissenting opinion by KELLY, J., issued July 24, 2007 (Docket No. 270430), at 5.

[28] *Abel v Eli Lilly & Co*, 418 Mich 311, 335 (1984).

[29] *Id*.

Rutan, claims of fraudulent inducement are not barred by the economic loss doctrine. Plaintiff presented credible evidence of defendant's precontractual fraud and misrepresentations distinct from its claims of breach of contract. Therefore, it is entitled to its day in court. Accordingly, because questions of fact remain unanswered regarding plaintiff's allegations, I would affirm the judgment of the Court of Appeals.

CAVANAGH, J. I join the statement of Justice KELLY.

BENEFIEL V AUTO-OWNERS INSURANCE COMPANY, No. 135778. On order of the Court, the motion for leave to file a brief amicus curiae is granted. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we hereby vacate the December 27, 2007, judgment of the Court of Appeals and remand this case to the Livingston Circuit Court for further proceedings not inconsistent with this order. The Court of Appeals properly reversed the Livingston Circuit Court's grant of summary disposition for the defendant because there remain disputed issues of fact. Viewing the evidence in the light most favorable to the plaintiff, the defendant has failed to show that, as a matter of law, the plaintiff cannot establish a serious impairment of body function. See MCL 500.3135(7); *Kreiner v Fischer*, 471 Mich 109 (2004). For that reason, we reverse the September 25, 2006, order of the Livingston Circuit Court that granted summary disposition to the defendant.

The remainder of the Court of Appeals analysis is faulty, however, because it is improperly premised on the plaintiff's "normal life" as it existed prior to his first accident. The Court of Appeals wrongly concluded, as a matter of law, that the plaintiff established a serious impairment of body function. A plaintiff who has suffered successive injuries bears the burden of proving that his current injury was caused by the subsequent accident (and not by some independent occurrence). See *Richman v City of Berkley*, 84 Mich App 258, 263 (1978); M Civ JI 36.11 and 36.15. Therefore, the plaintiff must prove that his preexisting impairment is temporary in order to have his pre-impairment lifestyle considered as his "normal life." It follows that, in this situation, the plaintiff must show either that his preexisting impairment was exacerbated or that his recovery was prolonged *as a result of* the subsequent accident for which he seeks noneconomic damages. Furthermore, this *subsequent* impairment must meet the statutory threshold in order for the plaintiff to recover noneconomic damages. Accordingly, we vacate the entire Court of Appeals opinion. Court of Appeals No. 273664.

YOUNG, J. (*concurring*). I concur in the order. I write separately only to point out that, contrary to Justice CAVANAGH's statement, causation is necessarily intertwined with the serious impairment inquiry under MCL 500.3135, because such an inquiry requires a preliminary finding with regard to the permanence or non-permanence of the plaintiff's preexisting injury.

Justice CAVANAGH would allow a court to consider causation only after determining whether the plaintiff's *combined* injuries meet the serious impairment threshold. This would allow a plaintiff who has suffered an earlier, permanent injury that itself amounts to a serious impairment of body function (such as the amputation of a leg) to recover noneconomic

damages for *any* injury caused by a subsequent accident, however minor those *actual* injuries are. Such a result is inconsistent with the no-fault statutory scheme, which allows plaintiffs to recover noneconomic damages when the injuries *caused by* the defendant's negligence meet the serious impairment threshold. Even the Court of Appeals acknowledged that a plaintiff is not entitled to use a preexisting, permanent injury to reach the serious impairment threshold. *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 419-420 (2007). Accordingly, I concur in the entirety of this Court's order.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree that we should affirm the Court of Appeals reversal of the trial court's grant of summary disposition for the defendant because the plaintiff has presented questions of fact concerning whether his current injury meets the statutory threshold for a serious impairment of a bodily function under MCL 500.3135(7) and regarding whether any such serious impairment was caused by the second accident. I also agree that the Court of Appeals erred in holding that plaintiff established a serious impairment as a matter of law. Thus, I too would remand to the trial court for further proceedings.

However, I do not agree that, in a multiple accident scenario, a plaintiff must prove that his preexisting impairment is not permanent in order for his lifestyle before that preexisting impairment to be included in his "normal life" evaluation. MCL 500.3135(7).

First, this new lack-of-permanency element is wholly absent from the statute's text. The statute simply does not include a lack-of-permanency element as an exception to the general "normal life" analysis. On the contrary, the statute simply states that a " 'serious impairment of body function' [is] an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." *Id*. Accordingly, the serious impairment analysis focuses on the plaintiff's "normal life." One's normal life is not limited to the narrow temporal snapshot directly before the accident. Nor is one's normal life limited to his life after a prior permanent injury. Instead, one's normal life includes a broader factual analysis than the majority order suggests in this case.[1] Accordingly, I respectfully dissent because I continue to refuse to take part in this Court's proclivity for using the judicial pen to insert terms and definitions into the no-fault act.[2]

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[1] The majority in this case has accepted as much in *Kreiner v Fischer*, 471 Mich 109 (2004), in stating that "the effect of the impairment on the course of a plaintiff's entire normal life must be considered," *id*. at 131, and that the "[the evaluation includes] a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life," *id*. at 132-133. Furthermore, "we merely require that the whole life be *considered* in determining what satisfies this threshold . . . ." *Id*. at 133 n 16 (emphasis in original).

[2] See *Kreiner*, *supra* at 147-149 (CAVANAGH, J., dissenting).

Second, the majority's order wrongly conflates the distinct questions of serious impairment and causation. I recognize that, in a multiple accident scenario, an injury from a later accident may not equate to a serious impairment because a claimant's injuries from earlier accidents were not sufficiently aggravated by the second accident. But, that scenario implicates an issue of causation, rather than one of serious impairment.

Causation and serious impairment are distinct issues. Indeed, the serious impairment question focuses on a particular injury's effect on the claimant's normal life. This involves a totality-of-the-circumstances analysis of many subjective indicia of the injury's effect on the claimant's entire normal life: medical history, work history, and recreational-activity history.[3] This stands in stark contrast to the causation analysis, which is a simple objective evaluation of what factual differences in person A's life are legally attributable to person B's actions. The causation question is very limited in scope and it does not include extensive qualitative analysis.

In sum, the serious impairment question concerns whether the injury meets the statutory threshold, whereas the causation question simply determines if the applicable accident caused the injury. While it is true that both questions look at the claimant's life before and after the applicable accident, they are inherently different in both scope and analysis. Accordingly, it is wrong to meld the two. But that is exactly what the majority order does by adopting a lack-of-permanency element in the serious impairment analysis. In essence, this new lack-of-permanency element holds that if a claimant has a permanent injury, then the claimant's "normal life" analysis must not include consideration of his life before the permanent injury. This wrongly makes a causation conclusion dispositive on the distinct question of serious impairment. If a defendant wishes to argue that his actions (or his insured's actions) did not cause claimant's injuries because the claimant already had those injuries (whether they be permanent or not), that is a causation argument—not a serious impairment argument.[4]

Finally, I continue to believe that *Kreiner* was wrongly decided. But I realize that a majority of this Court continues to believe otherwise. Accepting this, I seriously question *Kreiner*'s efficacy as a clarion

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[3] See *Kreiner*, *supra* at 131, stating: The starting point in analyzing whether an impairment affects a person's "general," i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life.

[4] Intuitively, when there is a permanent preexisting injury, many defendants will be successful in arguing that a claimant's current injuries are unchanged by the latest accident. To be sure, those defendants are entitled to dismissal, but their success rests on a lack of causation, not an absence of serious impairment.

statement describing what does, or does not, establish a serious impairment. Here, as in other post-*Kreiner* cases, the majority order simply cites *Kreiner*'s rule and then adds an element that was wholly absent from that decision.[5] *Kreiner* simply does not include a lack-of-permanency element in its comprehensive serious impairment analysis. Hence, this new element is the latest edition of this Court's changing application of the statute under a fabricated application of *Kreiner*. I must note that the majority order in this case validates my earliest reservations about *Kreiner*, a case in which I observed that "[t]oday's decision [*Kreiner*] serves as a chilling reminder that activism comes in all guises, including so-called textualism." *Id*. at 157 (CAVANAGH, J., dissenting).

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

BIG L CORPORATION V COURTLAND CONSTRUCTION COMPANY, No. 136420. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that cites *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 121 (1997), for the applicable rule of statutory interpretation. Although the Court of Appeals correctly stated that the Construction Lien Act (CLA) is to be liberally construed to effectuate the purposes of the act and that substantial compliance is sufficient, MCL 570.1302(1), it improperly relied on *Vugterveen*, rather than MCL 570.1302(1), for those rules of statutory interpretation. *Big L Corp v Courtland Constr Co*, 278 Mich App 438, 441 (2008). In all other respects, the application for leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. Reported below: 278 Mich App 438.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in the order striking the Court of Appeals' citation of *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 121 (1997), for the applicable rule of statutory interpretation. I dissent, however, because I do not think that eliminating the requirement of notarization, rendering the statement furnished by the contractor in essence a mere notice, can be "substantial compliance" under MCL 570.1110. The Legislature placed "notice" provisions and a sample notice in MCL 570.1109; it put sworn statement provisions in MCL 570.1110. In MCL 570.1110, our Legislature mentioned "sworn statement" 33 times. It provides a sample "sworn statement" and creates penalties for making false sworn statements with intent to defraud. In concluding that swearing is no longer necessary under this section, we obliterate the distinction between notice in § 1109 and "sworn statement" in § 1110 that the Legislature crafted. I do not think that either the familiar tenets of "liberal construction" or "substantial compliance" really allow us to go so far as to obliterate the carefully crafted distinctions between notices in § 1109 and sworn statements in § 1110.

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[5] See, e.g., *Jones v Olson*, 480 Mich 1169, 1169-1173 (2008) (CAVANAGH, J., dissenting).

The Construction Lien Act (CLA), MCL 570.1101 *et seq*., which took effect on January 1, 1982, "was intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs." *Vugterveen*, *supra* at 121. To that end, a contractor must submit a sworn statement to an owner when payment is due or demanded, identifying each subcontractor, supplier, and laborer and the amounts owed, and "the owner can rely on a sworn statement as a comprehensive list of potential lien claimants." *Vugterveen*, *supra* at 123; MCL 570.1110(1), (4). An owner or contractor may also rely on a sworn statement as a defense against a subcontractor's claim of lien, unless the subcontractor has submitted a timely notice of furnishing. *Id*. at 123-124; MCL 570.1110(7). The Homeowner Construction Lien Recovery Fund was statutorily created "to provide payment to subcontractors or suppliers when a homeowner has already paid a contractor once in full for an improvement to his house but the contractor misused or misappropriated the money without first paying the supplier." *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 391 (1999).

In this case, plaintiff subcontractor filed suit, seeking recovery from defendant Homeowner Construction Lien Recovery Fund. The trial court granted a judgment for plaintiff, ruling that the contractor's "sworn statements," which provided notice of the identity of the subcontractors, suppliers, and laborers, and the amounts owed to each, did not substantially comply with the CLA, MCL 570.1110(4), because they were not notarized. Therefore, plaintiff's late filing of a claim of lien did not defeat its right to a lien. The Court of Appeals reversed in a published opinion. *Big L Corp v Courtland Construction Co*, 278 Mich App 438 (2008). The panel held that the "sworn statements" substantially complied with the CLA even though they were not notarized. It observed that because the statements were signed and dated, they fulfilled the statute's "sworn statement" requirement by providing the owner with notice of the identity of the subcontractors, suppliers, and laborers and the amount owed to each for materials and labor. It concluded that because the "sworn statements" substantially complied with MCL 570.1110(4), plaintiff's claim of lien for materials furnished before the date of its notice was defeated because the notice was untimely. *Big L*, *supra* at 444-445.

In ruling that an unsworn statement was not in substantial compliance with MCL 570.1110, the trial court properly looked to the statutory language itself. It compared MCL 570.1110, which requires contractors and subcontractors to furnish a "sworn statement," under certain circumstances, with MCL 570.1109, which governs the requirement of subcontractors and laborers to provide a "notice of furnishing." MCL 570.1110 provides, in part:

> (1) A contractor shall provide a *sworn statement* to the owner or lessee in each of the following circumstances:
>
> (a) When payment is due to the contractor from the owner or lessee or when the contractor requests payment from the owner or lessee.
>
> (b) When a demand for the *sworn statement* has been made by or on behalf of the owner or lessee.

(2) A subcontractor shall provide a *sworn statement* to the owner or lessee when a demand for the *sworn statement* has been made by or on behalf of the owner or lessee and, if applicable, the owner or lessee has complied with the requirements of subsection (6).

(3) A subcontractor shall provide a *sworn statement* to the contractor when payment is due to the subcontractor from the contractor or when the subcontractor requests payment from the contractor.

(4) A *sworn statement* shall list each subcontractor and supplier with whom the person issuing the *sworn statement* has contracted relative to the improvement to the real property. The *sworn statement* shall contain a list of laborers with whom the person issuing the *sworn statement* has contracted relative to the improvement to the real property and for whom payment for wages or fringe benefits and withholdings are due but unpaid and the itemized amount of such wages or fringe benefits and withholdings. The *sworn statement* shall be in substantially the following form:

SWORN STATEMENT

State of Michigan)

) ss.

County of.....)

.....(deponent), *being sworn*, states the following:

.....is the (contractor) (subcontractor) for an improvement to the following real property in

.....County, Michigan,

described as follows:

.....

(insert legal description of property)

The following is a statement of each subcontractor and supplier, and laborer for whom payment of wages or fringe benefits and withholdings is due but unpaid, with whom the (contractor) (subcontractor) has (contracted) (subcontracted) for performance under the contract with the owner or lessee of the property, and the amounts due to the persons as of the date of this statement are correctly and fully set forth opposite their names:

Name, address, and telephone number of subcontractor, supplier, or laborer	Type of improvement furnished	Total contract price	Amount already paid	Amount currently owing	Balance to complete (optional)	Amount of laborer wages due but unpaid	Amount of laborer fringe benefits and withholdings due but unpaid
.....							
Totals							

(Some columns are not applicable to all persons listed)

The contractor has not procured material from, or subcontracted with, any person other than those set forth and owes no money for the improvement other than the sums set forth.

I make this statement as the (contractor) (subcontractor) or as ..... of the (contractor) (subcontractor) to represent to the owner or lessee of the property and his or her agents that the property is free from claims of construction liens, or the possibility of construction liens, except as specifically set forth in this statement and except for claims of construction liens by laborers that may be provided under section 109 of the construction lien act, 1980 PA 497, MCL 570.1109.

WARNING TO OWNER OR LESSEE: AN OWNER OR LESSEE OF THE PROPERTY SHALL NOT RELY ON THIS *SWORN STATEMENT* TO AVOID THE CLAIM OF A SUBCONTRACTOR, SUPPLIER, OR LABORER WHO HAS PROVIDED A NOTICE OF FURNISHING OR A LABORER WHO MAY PROVIDE A NOTICE OF FURNISHING UNDER SECTION 109 OF THE CONSTRUCTION LIEN ACT, 1980 PA 497, MCL 570.1109, TO THE DESIGNEE OR TO THE OWNER OR LESSEE IF THE DESIGNEE IS NOT NAMED OR HAS DIED.

IF THIS *SWORN STATEMENT* IS IN REGARD TO A RESIDENTIAL STRUCTURE, ON RECEIPT OF THE *SWORN STATEMENT*, THE OWNER OR LESSEE, OR THE OWNER'S OR LESSEE'S DESIGNEE, MUST GIVE NOTICE OF ITS RECEIPT, EITHER IN WRITING, BY TELEPHONE, OR PERSONALLY, TO EACH SUBCONTRACTOR, SUPPLIER, AND LABORER WHO HAS PROVIDED A NOTICE OF FURNISHING UNDER SECTION 109 OR, IF A NOTICE OF FURNISHING IS EXCUSED UNDER SECTION 108 OR 108A, TO EACH SUBCONTRACTOR, SUPPLIER, AND LABORER NAMED IN THE *SWORN STATEMENT*. IF A SUBCONTRACTOR, SUPPLIER, OR LABORER WHO IS ENTITLED TO NOTICE OF RECEIPT OF THE *SWORN STATEMENT* MAKES A REQUEST, THE OWNER, LESSEE, OR DESIGNEE SHALL PROVIDE THE REQUESTER A COPY OF THE *SWORN STATEMENT* WITHIN 10 BUSINESS DAYS AFTER RECEIVING THE REQUEST.

.....
Deponent

WARNING TO DEPONENT: A PERSON WHO GIVES A FALSE *SWORN STATEMENT* WITH INTENT TO DEFRAUD IS SUBJECT TO CRIMINAL PENALTIES AS PROVIDED IN SECTION 110 OF THE CONSTRUCTION LIEN ACT, 1980 PA 497, MCL 570.1110.

Subscribed and *sworn* to before me on ..... (DATE)

.....
Notary Public, ... County, Michigan.

My commission expires: ..... .

(5) The contractor or subcontractor is not required to list in the *sworn statement* material furnished by the contractor or subcontractor out of his or her own inventory that was not purchased specifically for performing the contract.

(6) On receipt of a *sworn statement* regarding an improvement to a residential structure, the owner, lessee, or designee shall give notice of its receipt, either in writing, by telephone, or personally, to each subcontractor, supplier, and laborer who has provided a notice of furnishing under section 109 or, if a notice of furnishing is excused under section 108 or 108a, to each subcontractor, supplier, and laborer named in the *sworn statement*. If a subcontractor, supplier, or laborer entitled to notice under this subsection requests a copy of the *sworn statement*, the owner, lessee, or designee shall provide the requester a copy within 10 business days after receiving the request.

(7) After the contractor or subcontractor provides the *sworn statement*, the owner or lessee may withhold or, upon written demand from the contractor, shall withhold from the amount due or to become due to the contractor or to the subcontractor for work already performed an amount sufficient to pay all sums due to subcontractors, suppliers, or laborers, as shown by the *sworn statement*, or due to lien claimants who have provided a notice of furnishing under section 109. . . .

(8) An owner, lessee, designee, mortgagee, or contractor may rely on a *sworn statement* prepared by a party other than himself or herself to avoid the claim of a subcontractor, supplier, or laborer unless the subcontractor, supplier, or laborer has provided a notice of furnishing as required under section 109 or unless the notice of furnishing is excused under section 108 or 108a.

(9) If a contractor fails to provide a *sworn statement* to the owner or lessee before recording the contractor's claim of lien, the contractor's construction lien is not invalid. However, the contractor is not entitled to any payment, and a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien, until the *sworn statement* has been provided.

(10) If a subcontractor fails to provide a *sworn statement* under subsection (2) to the owner or lessee before recording the subcontractor's claim of lien, the subcontractor's construction lien is valid. However, a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien until the *sworn statement* has been provided.

(11) A contractor or subcontractor who desires to draw money and gives or causes to be given to any owner or lessee a *sworn statement* required by this section that is false, with intent to defraud, is guilty of a crime as follows: . . . . [Emphasis added.]

In contrast, MCL 570.1109 provides, in part:

(1) Except as otherwise provided in sections 108, 108a, and 301, a subcontractor or supplier who contracts to provide an improvement to real property shall provide a notice of furnishing to the designee and the general contractor, if any, as named in the notice of commencement at the address shown in the notice of commencement, either personally or by certified mail, within 20 days after furnishing the first labor or material. . . .

(2) Except as otherwise provided in sections 108 and 108a, a laborer who contracts to provide an improvement to real property shall provide a notice of furnishing to the designee and the general contractor, if any, as named in the notice of commencement at the address shown in the notice of commencement, either personally or by mail, within 30 days after wages were contractually due but were not paid. . . .

(3) Except as otherwise provided in sections 108 and 108a, a laborer who provides an improvement to real property shall provide a notice of furnishing to the designee and the general contractor, if any, named in the notice of commencement at the address shown in the notice of commencement, either personally or by certified mail, by the fifth day of the second month following the month in which fringe benefits or withholdings from wages were contractually due but were not paid. . . .

(4) The notice of furnishing, if not given on the form attached to the notice of commencement, shall be in substantially the following form:

NOTICE OF FURNISHING

To: .....
(name of designee (or owner or lessee) from notice of commencement)

.....
(address from notice of commencement)

Please take notice that the undersigned is furnishing to.....

.....
(name and address of other contracting party)

certain labor or material for.....
(describe type of work)
in connection with the improvements to the real property decribed in the notice of commencement recorded in liber....., on page.....,.....records.
(name of county)
.....
or (a copy of which isttached hereto)

WARNING TO OWNER: THIS NOTICE IS REQUIRED BY THE MICHIGAN CONSTRUCTION LIEN ACT. IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS AND DUTIES UNDER THIS ACT, YOU SHOULD CONTACT AN ATTORNEY TO PROTECT YOU FROM THE POSSIBILITY OF PAYING TWICE FOR THE IMPROVEMENTS TO YOUR PROPERTY. .

.....
(name and address of lien claimant)

by.....
(name and capacity of party signing for lien claimant)

.....
(address of party signing)

Date: ..... .

(5) The failure of a lien claimant to provide a notice of furnishing within the time specified in this section shall not defeat the lien claimant's right to a construction lien for work performed or materials furnished by the lien claimant after the service of the notice of furnishing.

(6) The failure of a lien claimant, to provide a notice of furnishing within the time specified in this section shall not defeat the lien claimant's right to a construction lien for work performed or materials furnished by the lien claimant before the service of the notice of furnishing except to the extent that payments were made by or on behalf of the owner or lessee to the contractor pursuant to either a contractor's *sworn statement* or a waiver of lien in accordance with this act for work performed or material delivered by the lien claimant. This subsection does not apply to a laborer.

(7) The failure of a laborer to provide a notice of furnishing to the designee as required by subsection (2) shall defeat the laborer's lien for those wages for which the notice of furnishing is required.

(8) The failure of a laborer to provide a notice of furnishing to the designee as required by subsection (3) shall defeat the laborer's lien for those fringe benefits and withholdings for which the notice of furnishing is required.

(9) The failure of a laborer to provide a notice of furnishing to the general contractor within the time specified in subsection (2) or (3) shall not defeat the laborer's right to a construction lien, but the laborer shall be liable for any actual damages sustained by the general contractor as a result of the failure.

(10) One or more laborers may authorize an agent to prepare and serve a notice of furnishing in the manner provided in this section. Notice of furnishing under this section may contain the notice of furnishing of more than 1 laborer and shall contain the information required in subsection (4) as to each laborer for whom it is prepared. The notice of furnishing of each lien claimant under this subsection shall be considered by the court on its own merits. [Emphasis added.]

The trial court compared MCL 570.1110 with MCL 570.1109 and observed that where the Legislature contemplated a notice requirement only, it simply used the word "notice." In contrast to MCL 570.1110, in which the words "sworn statement" appear more than 30 times, MCL 570.1109 contains no mention of sworn statements or notarization, and speaks only in terms of notice. In addition, MCL 570.1109(4) provides a sample "Notice of Furnishing" form, which includes spaces for the names and addresses of the contracting parties, descriptions of the work to be performed and the property, and for the signature of the lien claimant. This is in contrast to the jurat provided in MCL 570.1110(4). As the trial court also noted, both MCL 570.1109 and MCL 570.1110 took effect on January 1, 1982. The differences between the language of these provisions and the sample forms they provide suggest that the Legislature specifically intended to require a notarized statement in MCL 570.1110 and that submission of an unsworn statement cannot constitute substantial compliance with that requirement.

In light of the deliberate differences between these two provisions, I cannot agree with the Court of Appeals that a contractor substantially complies with the requirements of MCL 570.1110 when its unsworn "sworn" statement gives the owner notice of the identity of the subcontractors, suppliers, and labors, and the amount owed to each, but is not notarized. This Court has recognized in other contexts that swearing an oath before a notary means more than establishing one's identity. For example, as the Court of Appeals noted in *Horton v Verhelle*, 231 Mich App 667, 676 (1998), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446 (1999), this Court has held that an affidavit that is neither signed nor sworn is not valid. *Prussing v Gen Motors Corp*, 403 Mich 366, 369-370 (1978); *People v Burns*, 161 Mich 169, 173 (1910).

I would also grant leave to appeal because the published Court of Appeals decision chooses between two prior conflicting Court of Appeals cases. In *Horton, supra* at 148, the Court held that "a contractor's statement that is neither signed nor sworn is not a 'sworn' statement as required by subsection 110(4)." In *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 510 (2003), the Court determined that an unverified statement substantially complied with the notice requirement of MCL 570.1110(8), because it gave the owner notice of the identity of the subcontractors, suppliers, and laborers, and the amount owed to each for labor and materials. Aside from noting that *Alan Custom Homes* was the more recent case, the Court did not explain its reasons for disregarding the reasoning in *Horton*. *Big L*, *supra* at 443-444.

Finally, I do not think footnote 4 of the Court of Appeals opinion, *id.* at 444 n 4, supports the Court's argument. In the footnote, the Court rejected plaintiff's argument that contractors will be more likely to submit false statements if they are not required to notarize their "sworn statements" because they will no longer be subjected to prosecution. The panel concluded that MCL 570.1110(11), which provides that a contractor who submits a false *sworn* statement is guilty of a crime, would "sufficiently deter general contractors from submitting false sworn statements even absent the threat of prosecution for perjury." *Big L*, *supra* at 444 n 4. I do not see how. If a contractor submits an unnotarized statement, the statement is not "sworn." The contractor could not be subject to the penalties under MCL 570.1110(11) because a crucial element of the offense is missing.

Accordingly, I dissent from this Court's order denying plaintiff's application for leave to appeal.

WEAVER, J. I would deny leave to appeal because I am not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH and KELLY, JJ. We join the statement of Justice WEAVER.

Leave to Appeal Denied December 12, 2008:

BUDGET RENT-A-CAR SYSTEM, INC v CITY OF DETROIT, No. 133887. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of May 2, 2008. The application for leave to appeal the February 1, 2007, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 271703.

MARKMAN, J. (*concurring*). The result in this case—affording no-fault benefits to a fleeing felon who was aiming a firearm at a pursuing police officer—is extremely troubling, but I agree with this Court and with the Court of Appeals that the law is clear that an insurer is required to pay

personal protection insurance benefits for any "accidental bodily injury arising out of the . . . use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). Moreover, "[e]ven though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself." MCL 500.3105(4). I see no basis for the dissent's conclusion that the claimant did not act "for the purpose of averting injury to . . . any person including himself." However reprehensible his conduct, the claimant clearly acted for the purpose of averting injury to *himself*, if not to anyone else.

Further, while I view the instant result to verge on the "absurd," it is difficult in light of the Legislature's response to an earlier, similar decision of this Court to conclude, as the "absurd results" rule requires, that it is "impossible that [our Legislature] could have intended the result . . . ." *Public Citizen v United States Dep't of Justice,* 491 US 440, 471 (1989) (Kennedy, J., concurring). In *Brown v Michigan Millers Mut Ins Co,* 467 Mich 886 (2002), a passenger in a vehicle involved in a drive-by shooting was awarded no-fault benefits when he was injured as the vehicle fled from the scene of the shooting. This Court denied leave to appeal, and I wrote a statement characterizing this result as a "social problem," and calling this "to the attention of the Legislature." Given that the Legislature has been made aware of this problem, and has chosen not to amend the law in the ensuing six years, I can only conclude that the words of this statute mean what they say and that the Legislature *does* intend that a no-fault insurer be liable in these circumstances. It is for the Legislature to determine our laws, and, for better or worse, it has clearly done so here.

WEAVER, J. (*dissenting*). I dissent from the order vacating this Court's order of May 2, 2008, granting the defendants' application for leave to appeal.

Having heard oral argument, I would reverse the Court of Appeals judgment that affirmed the trial court's grant of summary disposition in the plaintiff's favor and would hold that the plaintiff is not entitled to reimbursement from the defendants for no-fault benefits the plaintiff mistakenly paid to the claimant.[1]

The claimant was not entitled to no-fault benefits because his injuries did not arise out of an "accidental bodily injury" as defined in MCL

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[1] The plaintiff, Budget Rent-a-Car System, Inc., which is self-insured, paid personal protection insurance benefits to the claimant after he rented a vehicle from the plaintiff and was subsequently injured. The plaintiff now seeks reimbursement from both defendants, the city of Detroit and the Detroit Police Department, which are also self-insured.

500.3105.[2] The injuries sustained by the claimant occurred as a result of the claimant's use of a vehicle rented from the plaintiff for the commission of criminal acts.[3]

While the claimant may not have intended to be injured, he "caused" his injuries by intentionally engaging in criminal behavior that put him at risk of injury and in fact resulted in his injuries. Indeed, MCL 500.3105(4) provides that even if a claimant "knows that bodily injury is substantially certain to be caused by his act or omission, he does not

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[2] MCL 500.3105(4) states:

> Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

[3] The Court of Appeals summarized the facts as follows:

> Hurt [claimant] rented a 2004 Monte Carlo automobile from plaintiff on approximately December 27, 2003. Hurt was operating the vehicle on January 16, 2004 when the Detroit Police observed Hurt allegedly engaged in a suspected narcotics transaction. Detroit Police Officer Arthur Wimmer responded to a radio call regarding the transaction. Wimmer, who was driving an unmarked police vehicle, stopped the vehicle as part of a traffic stop. As Wimmer approached the rented vehicle on foot, Hurt sped away at a high rate of speed. Wimmer followed Hurt's vehicle at an accelerated pace until Hurt lost control of the rented vehicle and it eventually came to a stop off the traveled portion of the road. Wimmer's police report and deposition state that he remained in his police vehicle while he approached Hurt in an attempt to contain Hurt until additional police assistance arrived. The police report also states that Hurt exited the driver's door of the rented vehicle with a handgun in his hand and pointed it directly at Wimmer from a semi-crouched position between the open door and the interior of the automobile. Wimmer ducked down, accelerated, and crashed into the driver's side door of the rented vehicle, resulting in damage to the vehicle and injury to Hurt. Hurt then ran away into an alley where police took him into custody. Hurt suffered laceration of his left leg and received treatment at Detroit Receiving Hospital. [*Budget Rent-A-Car Sys, Inc v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2007 (Docket No. 271703), p 1.]

cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself."

Because the claimant did not act, or refrain from acting, "for the purpose of averting injury to . . . any person including himself," the claimant's injuries were not "accidental." Thus, I dissent and would reverse the Court of Appeals judgment affirming the trial court's grant of summary disposition to the plaintiff. Any remedy for plaintiff's error in mistakenly paying the claimant no-fault benefits for injury stemming from the claimant's intentional criminal activity must be pursued against the claimant.

BEACH v KELLY AUTOMOTIVE GROUP, INC, No. 136518; Court of Appeals No. 274142.

YOUNG, J. (*concurring*). I concur in this Court's decision to deny leave to appeal. Although the attorney fee award in this case is disproportionate to "the amount involved and the results obtained,"[1] I believe that the lower courts properly attributed the extraordinary fees to defendant's conduct, which unnecessarily caused additional costs.

After an 11-day bench trial, the district court determined that defendant violated the Motor Vehicle Service and Repair Act (MVSRA), MCL 257.1301 *et seq*., and awarded plaintiff a total of $11,716.46 in damages. Pursuant to MCL 257.1336,[2] defendant was liable for plaintiff's "reasonable attorney fees." Plaintiff sought attorney fees and submitted her attorney's billing statement, which indicated that the attorney expended 359.45 hours at a rate of $200 an hour. Plaintiff reduced the product by $2,000 for sanctions that defendant previously paid and requested $69,890 in attorney fees. After a hearing on plaintiff's motion for attorney fees, the district court reduced the requested rate to $150 an hour, but credited plaintiff's attorney for all of the time that she claimed and awarded plaintiff $51,917.45 in attorney fees.

Defendant appealed the verdict and the fee award to the circuit court. The circuit court affirmed the district court and held a hearing on plaintiff's motion for appellate attorney fees. Plaintiff again submitted her attorney's billing statement, which indicated that she expended

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[1] MRPC 1.5(a)(4).

[2] MCL 257.1336 provides:

> A facility that violates [the Motor Vehicle Service and Repair Act] or who, in a course of dealing as set forth in this act or rules, engages in an unfair or deceptive method, act, or practice, is liable as provided in this act to a person who suffers damage or injury as a result thereof in an amount equal to the damages plus reasonable attorney fees and costs. If the damage or injury to the person occurs as the result of a wilful and flagrant violation of this act, the person shall recover double the damages plus reasonable attorney fees and costs.

327.25 hours on the appeal at a rate of $250, for a total of $81,812.50 in attorney fees. The circuit court reduced the hours claimed to 267.25 hours and plaintiff voluntarily reduced her requested rate to $200 an hour. The circuit court awarded an additional $2,100 for time spent on the motion hearing, and awarded a total of $55,550 in attorney fees. Thus, plaintiff has been awarded $107,467.45 in attorney fees, despite only obtaining $11,716.46 in damages.

In *Smith v Khouri*, I joined the lead opinion holding that consideration of MRPC 1.5(a)(4) ("the amount in question and the results achieved") was "not a relevant consideration in determining a reasonable attorney fee for case-evaluation sanctions."[3] That was unique to the policy underlying case evaluation sanctions:

> [T]he purpose of MCR 2.403(O) is to encourage serious consideration of case-evaluation awards and penalize a party that "should have" accepted the case evaluation. The rejecting party that does not achieve a more favorable result must pay reasonable attorney fees "for services necessitated by the rejection . . . ." MCR 2.403(O)(6). It would be inconsistent with MCR 2.403(O) to reduce the accepting party's reasonable attorney fees "for services necessitated by the rejection" on the basis of the amount in question or the results achieved. If we were to do so, the accepting party could have properly evaluated the case value, yet be forced to incur additional fees, potentially in excess of the case's value. Reducing the accepting party's reasonable attorney fees necessitated by the rejection because they exceed or are disproportionate to the value the accepting party correctly assessed undermines the rule. MCR 2.403(O) penalizes the rejecting party who incorrectly valued the case, not the accepting party who correctly assessed the case's value at a much earlier and efficient time. Reducing the accepting party's reasonable attorney fees on the basis of more proportionality simply encourages the inefficiency the rule seeks to combat.[4]

There is no similar reason to disregard the "the amount in question and the results achieved" for attorney fees under provisions similar to MCL 257.1336.

Pursuant to § 1336, plaintiff is entitled to "reasonable attorney fees." The Court of Appeals observed that "[t]he monetary value of the damages in [consumer protection] cases is often low and the attorney fee award in these cases must be sufficient to provide a reasonable return on the

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[3] 481 Mich 519, 534 n 20 (2008).

[4] *Id.*

attorneys' time investment."[5] The purpose is to make it economically possible for attorneys to represent plaintiffs in consumer protection cases, "not . . . to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls."[6] Adjusting attorney fees based on "the amount in question and the results achieved" is not antithetical to the purpose of § 1336. Unlike MCR 2.403(O), which seeks to increase efficiency and penalize a rejecting party that "should have" accepted a case evaluation, § 1336 simply seeks to ensure a reasonable return on the attorney's time investment, i.e., that the attorney receives a reasonable fee. Thus, all the *Wood*[7] and MRPC 1.5(a) factors, including "the amount in question and the results achieved," are relevant.

Nevertheless, I do not believe that the lower courts erred or that defendant is entitled to relief. In *Khouri*, a majority of this Court agreed that courts are not limited to the *Wood* and MRPC 1.5(a) factors when considering attorney fee awards: "To the extent a trial court considers any factor not enumerated in *Wood* or MRPC 1.5(a), the court should expressly indicate this and justify the relevance and use of the new factor."[8] I believe that defendant's culpability for the extraordinary attorney fees justifies the award,[9] and the lower courts properly "indicate[d] this and justif[ied] the relevance and use of the new factor."

The district court expressly addressed the defendant's culpability for the exceptional fees. That court thought that defendant's approach to the litigation—a "complete denial" and "complete lack of cooperation"—directly caused plaintiff's attorney to expend a disproportionate amount of time on the case: "[I]t was one of those cases where the . . . number of hours spent by Plaintiff's counsel was mainly dictated by the way in which [defendant] dealt with this case . . . ." Because of the defendant's conduct, the district court expressly stated that it was "really not concerned about the hours." Indeed, the time expended by plaintiff's attorney would have been greatly reduced if defendant had not submitted what the circuit court determined to be false affidavits.

On appeal to the circuit court, defendant filed a 13-question, fact-intensive appeal, which generated an 80-page bench opinion. The circuit

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[5] *Beach v Kelly Automotive Group, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2008 (Docket No. 274142), at 2, citing *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 98-99 (1995).

[6] *Khouri*, *supra* at 528.

[7] *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573 (1982).

[8] *Khouri*, *supra* at 531 n 15.

[9] See *City of Riverside v Rivera*, 477 US 561, 594 (1986) (Rehnquist, J., dissenting) ("If the litigation is unnecessarily prolonged by the bad-faith conduct of the defendants, . . . then the purpose of Congress in authorizing attorney's fees under [42 USC 1988] should allow a larger award of attorney's fees than would be 'reasonable' where the only relief is the recovery of monetary damages by individual plaintiffs.").

court stated that defendant's appellate brief was "unfocused" and explained the consequences of such a brief:

> [Q]uite often . . . the brief filed by one party will drive the briefs . . . and there were statements in here [defendant's brief], sort of generalized statements about what went on [at trial] . . . that are difficult to in terms of time . . . to confirm one way or the other. A statement for example, ["]appellee failed to offer any evidence as to the condition of McInerny's["] . . . . Actually it turns out that, that is not true . . . but I understand why counsel makes this statement, but in order to analyze that and then fit it in the broader picture, requires a consideration of a lot of paper.

The circuit court, therefore, properly attributed the amount of plaintiff's appellate attorney fees to defendant because defendant's "unfocused" brief drove the appellate litigation.

Moreover, even without this Court's guidance in *Khouri*,[10] the lower courts used a statistical survey from the State Bar to determine a reasonable rate and then multiplied that rate by the reasonable hours expended.[11] Indeed, using the survey, the district court reduced plaintiff's requested rate from $200 an hour to $150 an hour. The circuit court reduced the hours requested from 327.25 hours to 267.25 hours because it determined that plaintiff's counsel could only reasonably expend 267.25 hours on the appeal. Each court then multiplied the rate by the reasonable hours expended to arrive at the fee award.

Accordingly, I do not believe that the lower courts erred. I believe that the circuit court and the district court expressly and properly attributed the extraordinary fees to defendant's conduct, and I concur in this Court's decision to deny leave to appeal.

TAYLOR, C.J. I join the statement of Justice YOUNG.

CORRIGAN and MARKMAN, JJ. We would reverse the judgment of the Court of Appeals, vacate the circuit court and district court orders awarding attorney fees, and remand the case to the trial court for reconsideration of plaintiff's request for attorney fees because we believe the district court clearly erred in refusing to consider the amount of the

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[10] This case was decided by the Court of Appeals on April 15, 2008. *Khouri* was decided on July 2, 2008.

[11] See *Khouri*, *supra* at 530-531, holding:

> [A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*).

judgment as a factor in determining a reasonable attorney fee. See the concurring statement of CORRIGAN, J., joined by MARKMAN, J., in *Smith v Khouri*, 481 Mich 519, 538 (2008).

In re BARNES (DEPARTMENT OF HUMAN SERVICES v BARNES), No. 137681; Court of Appeals No. 284630.

Leave to Appeal Granted December 15, 2008:

BUSH v SHABAHANG, Nos. 136617, 136653, and 136983. On November 19, 2008, the Court heard oral argument on the applications for leave to appeal the May 1, 2008, judgment of the Court of Appeals. On order of the Court, the applications are again considered, and they are granted, limited to the issues: (1) whether the plaintiff's defective notice of intent as to defendants West Michigan Cardiovascular Surgeons and Spectrum Health tolled the period of limitations pursuant to MCL 600.5856(c), as amended by 2004 PA 87, effective April 22, 2004; and (2) whether defendant Shabahang's defective response to the plaintiff's notice of intent, MCL 600.2912b(7), was presumed valid such that the plaintiff was required to wait the full 182-day period before filing his medical malpractice action. Reported below: 278 Mich App 703.

KELLY, J. (*concurring*). I concur in the order granting leave to appeal. However, I would welcome briefing and argument on all issues raised in the three cases in which leave to appeal has been granted.

Summary Disposition December 15, 2008:

PEOPLE v HOLMES, No. 137380. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the defendant's convictions. The trial court did not abuse its discretion in denying the jury's request for a copy of the entire transcript after a little over an hour of deliberation. Because the jury requested the entire transcript and did not request "a review of certain testimony or evidence," the trial court did not violate MCR 6.414(J). The defendant did not demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763 (1999). Court of Appeals No. 277816.

MARKMAN, J. (*concurring*). I concur in this Court's decision to reverse the judgment of the Court of Appeals and reinstate defendant's convictions. I write separately only to respond to the dissent's statement that the instant case is "similar" to *People v Howe,* 392 Mich 670 (1974). In *Howe,* the jury requested "certain testimony," MCR 6.414(J), i.e., that of the *two* principal witnesses in the case, whereas, in the instant case, the jury requested the testimony of *all* the witnesses. Even more significantly, however, in *Howe,* the trial court denied the jury's request outright and made it clear that it would not reconsider its decision because it thought, incorrectly, that it would be improper to provide the jurors with the testimonies of two witnesses only, and not those of other witnesses, because the jury might place too much emphasis on the

testimonies of those two witnesses. By contrast, in the instant case, the trial court's decision was clearly provisional because it made clear that the only reason it was denying the request "at this juncture" was because a transcript was not "yet" available. Therefore, unlike the court in *Howe,* the court here clearly did not "foreclose[]" the "possibility of having the testimony . . . reviewed at a later time," as is prohibited by MCR 6.414(J).

KELLY, J. (*dissenting*). I would affirm the judgment of the Court of Appeals and remand the case for a new trial. Defendant was on trial for various weapons charges. The jury sent several notes to the judge during deliberations. One of the notes, sent about an hour into deliberations, requested a transcript of the testimony. The trial court instructed the jury:

> The case isn't old enough to have a transcript yet, and we've only had a day and a half of testimony, altogether maybe just a day. You have to use your collective memories, your collective memories as to what you saw and what you heard. At this juncture we do not have a transcript. You may return to the jury room to continue your deliberations.

Defense counsel neither objected to nor approved of the instruction. The jury never again asked the court for a transcript.

MCR 6.414(J), which governs jury requests for testimony, provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

It was, of course, entirely reasonable that the trial judge in this case could not provide the jury with a trial transcript soon after the jury began its deliberations. Nevertheless, under MCR 6.414(J) a judge may not foreclose the possibility of a jury review of the transcript at a later time.

This Court considered similar circumstances in *People v Howe*[1] when the jury requested the transcript of testimony from two witnesses. In *Howe,* this Court determined that the trial judge had erred in responding to the jurors' request for testimony because the judge (1) "never indicated to the jury that a more specific request would be granted," (2) "never indicated to the jury that their request could be entertained at a

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[1] *People v Howe,* 392 Mich 670 (1974). Justice MARKMAN points out that, in *Howe,* the jury requested the testimony of only two witnesses, whereas in this case it requested the testimony of all the witnesses. This fact is not key to *Howe*'s application here. Regardless of the scope of a request, a trial judge cannot foreclose the possibility of having the testimony or evidence reviewed at a later time.

later point in their deliberations," (3) "clearly stated that he could not grant [the jurors'] request," and (4) "instructed the jury to 'rely on your memory[,]' thus directing them to attempt to reach a verdict based upon what they were able to recall from the trial testimony."[2] All of these errors occurred in the present case.

Given the trial judge's instruction, a reasonable juror would infer that there would be no opportunity to review any of the trial testimony.[3] The jury was not afforded any alternatives to a trial transcript, such as having the court reporter read back portions of the testimony.[4] Nor was the jury told when a trial transcript would be available so it could renew its request. The jurors were told to use their collective memory in deliberations.

As the Court of Appeals noted, it is impossible to know what effect the trial transcript would have had on the jury's deliberations. We do not know what occurred in the jury room.[5] The Court of Appeals correctly found error that required reversal, because the trial court's instructions in this case left the jury with the impression that it was foreclosed from reviewing any testimony at all. I would affirm.

CAVANAGH, J. I join the statement of Justice KELLY.

Leave to Appeal Denied December 15, 2008:

PEOPLE v CHRISTIAN SIERRA, No. 135772; Court of Appeals 277838.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I dissent from the order. I would grant leave to appeal so that this Court can fully explore and resolve the important question raised.

FACTS AND PROCEDURAL HISTORY

At trial in this case, defendant sought to introduce testimony from a

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[2] *Id.* at 677-678.

[3] Justice MARKMAN asserts that the trial court's decision was "clearly provisional." There was nothing provisional about it. The judge refused the jurors' request for the transcripts. She then told them to return to the jury room and rely on their collective memories. This left the jurors with the impression that they had to continue deliberations and agree on a verdict without any recapitulation of the testimony. Nothing in the trial judge's comments to the jury indicated that a transcript would be available at a future time.

[4] MCR 6.414(J) does not explicitly require the trial judge to provide the jury with alternatives to unreasonable requests for testimony. Alternatives may not be necessary in every situation. However, providing an alternative here would have assured the jury that it was not foreclosed from reviewing other sources of the trial testimony or the transcripts at a future time.

[5] *People v Smith,* 396 Mich 109, 111 (1976). It is worth noting that in the instant case the jury sent the judge a note stating that "we are undecided on all three counts. There will be no anonymous [sic] decision."

witness regarding the drug ring in which defendant allegedly participated. The witness began testifying before the jury, but ceased when it became clear that she was incriminating herself. Once counsel had been appointed for her, she invoked her Fifth Amendment right against self-incrimination. The parties then agreed that she was unavailable to testify.

Defendant sought to introduce the witness's testimony from his brother's 1999 trial for possession of cocaine with intent to deliver. In that trial, the witness had testified for the prosecution. In both proceedings, the witness testified about her involvement in the drug ring with defendant's brothers, Domingo and Oscar, but also testified that she did not know defendant. The prosecution opposed the defense motion for admission of the prior testimony. The trial judge granted defense counsel's motion, and the videotaped testimony from the 1999 trial was played for the jury. The jury later was unable to reach a unanimous verdict, and the trial judge declared a mistrial.

At defendant's second trial, the prosecution again sought to preclude the witness's testimony. This time, the same trial judge ruled the prior testimony inadmissible and certified the issue for appellate review. The Court of Appeals affirmed in a split decision.[1] This Court granted oral argument on the application for leave to appeal.[2]

MRE 804(b)(1)

Michigan Rule of Evidence (MRE) 804(b)(1) dictates when testimony given by a witness at a prior proceeding is admissible. The rule allows the testimony to be admitted "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[3]

The only question here is whether the prosecution had a similar motive to develop the witness's testimony at the 1999 trial. At defendant's second trial, the court ruled that the witness's prior testimony was inadmissible. It reasoned that the prosecution did not have the "opportunity or a similar motive" to develop her testimony at the 1999 trial.

This Court addressed the application of MRE 804(b)(1) to prior testimony given at a preliminary examination in *People v Meredith*.[4] The *Meredith* majority noted that the attorneys for some of the defendants had an opportunity to cross-examine the unavailable witness at the original examination. Counsel for the remaining defendant had both an

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[1] *People v Sierra*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2008 (Docket No. 277838).

[2] *People v Sierra,* 482 Mich 883 (2008).

[3] MRE 804(b)(1).

[4] *People v Meredith,* 459 Mich 62 (1998).

opportunity and a similar motive to cross-examine the witness at a subsequent examination, but specifically waived defendant's right to do so. Therefore, the Court concluded, each defendant had an opportunity and a similar motive to develop the witness's testimony.[5]

Meredith and later Court of Appeals decisions reinforced the practice of setting a low threshold for what constitutes a "similar motive" for purposes of the admissibility of evidence under MRE 804(b)(1).[6] This Court has also held that federal law interpreting a similar federal rule of evidence may be considered when construing the state version of the rule.[7] Therefore, cases interpreting the corresponding federal rule of evidence, FRE 804(b)(1), are also instructive.

In *United States v Foster*,[8] the Sixth Circuit Court of Appeals held that it was an abuse of discretion for the trial court to exclude prior testimony for lack of a similar motive. The witness in *Foster* testified for the prosecution at a grand jury proceeding. When he became unavailable at the time of trial, defense counsel sought to introduce his grand jury testimony because it tended to exculpate the defendant. The witness's earlier testimony summarized the witness's involvement in drug trafficking, but denied that the defendant was involved. The trial court denied defense counsel's motion, but the Sixth Circuit reversed, holding that "the fact that the district court did not admit the testimony constitutes an abuse of discretion . . . because [the witness's] exculpatory testimony could have had a significant impact on the jury's verdict."[9]

I believe that the trial court and the Court of Appeals may have erred in this case in ruling that the prosecutor lacked a similar motive for developing the witness's testimony at the 1999 trial. The Court of Appeals majority framed the issue very narrowly.[10] Under its analysis, a party against whom testimony is offered would never have a similar motive for questioning a witness in a proceeding involving a different defendant. The motive would always be solely to establish the guilt of the defendant being tried at the time. Such an outcome is contrary to the clear directive of MRE 804(b)(1), which refers to testimony "given as a witness at another hearing of the same *or a different proceeding*" and also states that the testimony may be developed through "direct, cross, or

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[5] *Id.* at 67.

[6] See *People v Adams*, 233 Mich App 652, 659 (1999), which cites *Meredith* as support for the conclusion that prior preliminary examination testimony is admissible. *Adams* assumes without question that the defendant had an opportunity and similar motive to develop the witness's testimony on cross-examination.

[7] *People v Katt*, 468 Mich 272, 280 (2003).

[8] *United States v Foster,* 128 F3d 949 (CA 6, 1997).

[9] *Id.* at 956.

[10] *Sierra, supra* at 3.

redirect examination."[11]

The Court of Appeals dissenting opinion used a more expansive analysis for evaluating what constitutes a "similar motive." At the 1999 trial, the prosecutor's motive for developing the witness's testimony was to elicit information about her drug purchases and the drug ring run by defendant's brothers. The prosecutor's intentions at this trial would be substantially similar to his motive in that case if the witness were available to provide live testimony: to demonstrate the witness's thorough knowledge of the workings of the drug ring and familiarity with defendant's brothers. The underlying reason that the prosecution elicited those facts in the 1999 case was to prove that Domingo Sierra was guilty. It does not have a new or different motive for developing the witness's testimony in this case. Moreover, the prosecutor's underlying goal here, to prove that Christian Sierra is guilty, is not the applicable standard for determining whether the prosecutor had a similar motive to develop the witness's testimony in 1999.

The prosecution also claims that, had the witness been available at trial, it would have asked her many additional questions and sought to challenge her credibility and knowledge. But the fact that the prosecutor might ask different questions or attempt to impeach the witness is irrelevant.[12] As this Court has noted previously, MRE 804(b)(1) does not require that a party took advantage of an opportunity to develop testimony; it requires only that such opportunity existed.[13] In 1999, the prosecutor had the opportunity to ask the witness any relevant questions; the fact that he chose not to do so does not justify precluding admissible and probative testimony helpful to the defendant's case.

CONCLUSION

I believe that defendant's "similar motive" argument warrants full briefing and oral argument. For that reason, I would grant leave to appeal to resolve this jurisprudentially significant issue.

Summary Disposition December 17, 2008:

SAZIMA V SHEPHERD BAR & RESTAURANT, No. 136940. On November 19, 2008, the Court heard oral argument on the application for leave to appeal the June 17, 2008, order of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the ruling of the Workers' Compensation Appellate Commission (WCAC). The WCAC erred by finding that the plaintiff's injury occurred in the course of her

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[11] MRE 804(b)(1) (emphasis added).

[12] "In virtually all subsequent proceedings, examiners will be able to suggest lines of questioning that were not pursued at a prior proceeding." *United States v DiNapoli*, 8 F3d 909, 914 (CA 2, 1993).

[13] *Meredith*, *supra* at 67.

employment. "[T]here is no recovery for an employee who is injured on a public street or other property not owned, leased, or maintained by the employer while traveling to or from a nonemployer parking lot because this injury is not in the course of employment." *Simkins v Gen Motors Corp (After Remand)*, 453 Mich 703, 723 (1996); see also MCL 418.301(3). The plaintiff's activity did not confer a special benefit on her employer, did not serve a dual purpose, nor did it subject her to excessive risk. The plaintiff was " 'master of [her] own movements upon the street and encountered there a risk incident to any user of the street.' " *Bowman v RL Coolsaet Constr Co (On Remand)*, 275 Mich App 188, 193 (2007), quoting *Dent v Ford Motor Co*, 275 Mich 39, 42 (1936). We agree with Justice WEAVER's concurring opinion in *Simkins*, and overrule *Fischer v Lincoln Tool & Die Co*, 37 Mich App 198 (1971), which is inconsistent with *Simkins*. Court of Appeals No. 281855.

YOUNG, J. (*concurring*). While I concur with the order reversing the Workers' Compensation Appellate Commission, I write to note that Justice WEAVER's dissenting statement is so breathtakingly and profoundly incoherent that it is hard to know how to respond to it.

Until today, I was not aware that a *dissenting* justice could purport (much less had the authority) to nullify a holding of a majority of this Court by simple declarative fiat. This order, signed by a majority of justices, overturns a Court of Appeals opinion which is inconsistent with Justice WEAVER's published position in *Simkins v Gen Motors Corp* (*After Remand*), 453 Mich 703 (1996). Thus, it is hard to understand why Justice WEAVER believes that this order is neither "precedential" nor "persuasive."

Given that it is entirely likely that I will soon be in the philosophical minority on this Court, I will take great pleasure citing and relying on Justice WEAVER's odd legal doctrine under which the minority view controls.

CAVANAGH, J. (*dissenting*). I dissent from this Court's order reversing the Workers' Compensation Appellate Commission (WCAC). I believe that the WCAC, and the workers' compensation magistrate, correctly concluded that plaintiff suffered disabling injuries in the course of her employment. I would deny leave to appeal.

Plaintiff, Stacy Sazima, was employed by defendant, Shepherd Bar & Restaurant. Defendant did not provide employee parking. In fact, defendant directed employees not to park in the public spaces located nearest to its place of business. It expressly informed its employees by written memo that the "[parking] spots out front are for our customers only." "[O]ut front" refers to the restaurant where plaintiff was employed and two adjacent buildings owned by defendant. Following defendant's directive, plaintiff parked in a space down the street from defendant's location. She fell and was injured while walking directly from the parking space to work. The workers' compensation magistrate found that plaintiff suffered disabling injuries in the course of her employment, and the WCAC agreed.

The Worker's Disability Compensation Act (WDCA) provides compensation for employees who are injured in the course of their employment.

MCL 418.301(1). It contains a provision that addresses whether an employee who is injured while going to or coming from work is injured in the course of employment:

> An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. . . . [MCL 418.301(3).]

In *Simkins v Gen Motors Corp (After Remand)*, 453 Mich 703, 710-711 (1996), this Court stated that it "construes the [WDCA] liberally to grant rather than deny benefits." *Simkins* also specified the appropriate application of § 301(3):

> Despite the apparent clarity of the statute requiring that the injury occur on the premises where the employee's work is to be performed, this Court has traditionally construed this phrase in a way that would allow recovery under the appropriate circumstances *even where the injury occurred on property that was not owned, leased, or maintained by the employer*. [*Simkins*, 453 Mich at 713 (quotation marks omitted; emphasis added).]

Ignoring these statements, the majority construes § 301(3) to deny benefits and disallow recovery. To suit this harsh and hasty disposition, the majority also avoids the broader rule of *Simkins* and selectively quotes a portion of the holding of that case that appears to support its result:

> [W]e hold that there is no recovery for an employee who is injured on a public street or other property not owned, leased, or maintained by the employer while traveling to or from a nonemployer parking lot because this injury is not in the course of employment. [*Simkins*, 453 Mich at 723.]

The selected excerpt, standing alone, could appear to mean that there is *never* a recovery for an employee who is injured on property not owned by the employer while going to or coming from work (unless that property is directly between an employer-owned parking lot and the employee's worksite). *Simkins* does not stand for this proposition.

The selected excerpt appears in *Simkins* at the end of a paragraph that announces the complete holding in that case. That paragraph begins by stating that its holding applies "unless the injury falls into one of the recognized exceptions" to the rule of MCL 418.301(3). *Simkins*, 453 Mich at 723. If an exception applies, "the place of the injury, although not on property owned, leased, or maintained by the employer, is deemed to be on the employer's 'premises' for the purposes of the statute." *Id*. Of course, if the injury is deemed to have occurred on the employer's

premises, then it occurs within the course of employment and is compensable under the WDCA. If there is no exception, § 301(3) applies to preclude recovery, as the portion selected by the majority indicates.

Three years after *Simkins* was decided, a majority of this Court listed some of the recognized exceptions to MCL 418.301(3) in *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471 (1999). Essentially summarizing the holding of *Simkins*, *Camburn* states:

> The general rule is that injuries that occur while traveling to or coming from work are not compensable. However, a number of exceptions have been recognized where (1) the employee is on a special mission for the employer, (2) the employer derives a special benefit from the employee's activity at the time of the injury, (3) the employer paid for or furnished the employee transportation as part of the contract of employment, (4) the travel comprised a dual purpose combining the employment-required business needs with the personal activity of the employee, (5) the employment subjected the employee to excessive exposure to the common risk . . . . [*Camburn*, 459 Mich at 478 (quotation marks and citations omitted).][1]

The majority acknowledges these exceptions, if only by unexplained rebuttal. I believe that at least two of the exceptions apply.

I believe that defendant derived a special benefit from plaintiff's activity when, on her way to work, she did not park in the public spaces in front of defendant's place of business. Plaintiff parked down the street because defendant had ordered that "spots out front are for our customers only." The benefit is obvious: convenient customer access is good for business. Defendant's owner admitted as much at plaintiff's workers' compensation hearing. He testified that he instructed employees, including plaintiff, not to park in the public spaces in front of his businesses because he may "lose customers if the spots in front of the bar fill up and, therefore, his employees are not to park there." *Sazima v Shepherd Bar & Restaurant*, 2007 Mich ACO 237, pp 2-3. Defendant, by its own admission, derived a benefit to its business from plaintiff's activities at the time of her injury. Thus, the circumstances of her injury fall within one of the recognized exceptions to MCL 418.301(3).

I also believe that plaintiff's travel from a more distant parking space "comprised a dual purpose combining the employment-required business needs with the personal activity of the employee." *Camburn*, 459 Mich at 478 (quotation marks and citations omitted). When she parked in a space

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[1] The *Camburn* majority opinion addressed the scope of employment and, as is evident from the quotation, its exceptions are applicable to the "coming and going" rule. I concurred with the result, but wrote separately to clarify the application of the "special mission" exception to the general rule that coming from and going to work is not "in the course" of work. *Camburn*, 459 Mich at 479-485 (CAVANAGH, J., concurring).

other than the public spaces immediately in front of defendant's buildings, plaintiff's actions were serving the dual purposes of getting herself to work and following her employer's instruction to leave the most convenient parking spaces open for potential customers. Although getting to work is a personal activity, acting according to an employer's express directive given for the purpose of generating business meets an employment-required business need.

Because the circumstances of plaintiff's injury clearly come within at least two of the recognized exceptions to MCL 418.301(3), the portion of *Simkins* holding quoted by the majority's order does not apply; plaintiff was injured in the course of her employment. I believe that the WCAC properly concluded that plaintiff's injuries were compensable under the WDCA. I would deny leave to appeal.

Finally, I would certainly not overrule *Fischer v Lincoln Tool & Die Co*, 37 Mich App 198 (1971), without reasoning or analysis.

KELLY, J. I join the statement of Justice CAVANAGH.

WEAVER, J. (*dissenting*). I dissent from the order reversing the ruling of the Workers' Compensation Appellate Commission. I would not peremptorily reverse the Court of Appeals order denying leave to appeal, which order has no precedential value.

This case should not be cited as precedent or as being persuasive.

Leave to Appeal Denied December 17, 2008:

PEOPLE v LINCOLN WATKINS, No. 135787. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of April 23, 2008. The application for leave to appeal the December 13, 2007, judgment of the Court of Appeals is denied, because we are no longer persuaded that the question presented should be reviewed by this Court. Reported below: 277 Mich App 358.

CAVANAGH, J. (*dissenting*). I disagree with the majority's decision to deny leave to appeal in this case. I am baffled by the fact that the majority is "no longer persuaded that the question presented should be reviewed by this Court." This case presents substantial issues regarding the separation of powers and the fairness of criminal trials. I can think of no issues that are more jurisprudentially significant. I would grant leave to appeal and reverse the Court of Appeals judgment.

This case addresses a conflict between a rule of evidence, MRE 404(b), and a statute, MCL 768.27a. MRE 404(b)(1) states in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." In other words, this rule does not allow the admission of evidence that a defendant committed a previous bad act for the sole purpose of showing that he is a bad character who is likely to have done something similar again.[1] MCL 768.27a(1), on the other hand, states that "evidence that the defendant

[1] The rule does, however, allow character evidence to be used for a variety of other purposes. See MRE 404(b)(1).

committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." In other words, in specified child-molestation cases, the statute allows the prosecution to offer evidence that a defendant previously committed an act similar to the one charged for the sole purpose of showing that the defendant likely did something similar again. The conflict between the provisions is clear and irreconcilable: the statute allows evidence in child-molestation cases that the rule of evidence expressly prohibits in all cases. Thus, the Court is asked to decide which one prevails.

The Court of Appeals concluded that the statute prevails over the rule of evidence. *People v Watkins*, 277 Mich App 358, 365 (2007). It reasoned that, while the provisions conflict, the statute controls because it addresses an issue of substantive law rather than a matter of practice or procedure. *Id*. I believe that the Court of Appeals erred because MCL 768.27a represents an unconstitutional legislative intrusion into the affairs of the judiciary.

The Michigan Constitution divides the powers of government into legislative, executive, and judicial branches. Const 1963, art 3, § 2. To maintain the separation of these powers, the constitution admonishes that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id*. Judicial power is vested exclusively in the judiciary. Const 1963, art 6, § 1. In exercise of that power, this Court "shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5.

The rule at issue, MRE 404(b), was established pursuant to this Court's power and duty to make rules of practice and procedure. It is a procedural rule created to ensure that criminal trials are fair by prohibiting the admission of certain unduly prejudicial evidence. This Court's power over procedural rules "may not be diminished, exercised by, nor interfered with by the other branches of government." *In re 1976 PA 267*, 400 Mich 660, 663 (1977). Further, "the legislature cannot dictate or control the procedures of our circuit courts." *Darr v Buckley*, 355 Mich 392, 396 (1959).

Importantly, MRE 404(b) provides procedural protections ensuring the fairness of criminal trials. There is no more core judicial function. In *People v Crawford*, 458 Mich 376, 383-384 (1998), this Court stated that "[t]he character evidence prohibition [in MRE 404(b)] is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence." (Quotation marks and citations omitted.) The *Crawford* Court further reasoned that "[e]vidence of extrinsic bad acts thus carries the risk of prejudice, for it is antithetical to the precept that a defendant starts his life afresh when he stands before a jury." *Id*. at 384 (quotation marks and citations omitted). The *Crawford* Court concluded that "[t]he fundamental principle of exclusion, codified by MRE 404(b), is woven into the fabric of Michigan jurisprudence." *Id*. If the Legislature can control this fundamental rule of procedure, the powers of the judicial branch are diminished to the vanishing point.

"It cannot be disputed that this Court has inherent as well as constitutional rulemaking power in the discharge of its general superintending control over all inferior courts." *Tomlinson v Tomlinson*, 338 Mich 274, 276 (1953). "This Court does possess broad powers in the forum of practice and procedure as provided in the 1963 Constitution." *People v Booth*, 414 Mich 343, 357 (1982). "It is also well settled that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government." *In re 1976 PA 267*, 400 Mich at 662-663. MCL 768.27a usurps the judiciary's power to ensure that criminal trials are fair. It is "an impermissible intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers." *In re 1976 PA 267*, 400 Mich at 663. As such, it must give way to MRE 404(b).

The Court of Appeals came to the contrary conclusion, relying on *McDougall v Schanz*, 461 Mich 15, 30 (1999), where a majority of this Court concluded that "a statutory rule of evidence violates Const 1963, art 6, § 5 only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified."[2] (Quotation marks and citations omitted.) I dissented in *McDougall*. I continue to believe that the majority reached its result in that case by improperly expanding the definition of substantive law to include any law with an identifiable policy purpose while reducing the definition of judicial "practice and procedure" to the mere dispatch of judicial business. *McDougall,* 461 Mich at 52-65. I also continue to believe that the majority's redefinition of constitutional powers effectively and impermissibly confines the power of the judiciary to the scheduling of docket sheets. *Id*. at 59 n 26. I characterized the majority opinion as an invitation to a legislative stampede over the fence created by our constitution's framers. *Id*. at 38. Today, by failing to prevent legislative interference with the fundamental rule of evidence at issue in this case, the majority has made the fence superfluous and fully opened the gate to legislative control of the separate and co-equal judiciary.

I respectfully dissent from this Court's order. And, given the majority's failure to address the substantial issues presented, I restate that "I can only hope that, at some point, . . . we will again revisit this issue, and rebuild the historic divide between the courts and the Legislature, which the majority has carelessly toppled today." *McDougall*, 461 Mich at 72 (CAVANAGH, J., dissenting).

KELLY, J. I join the statement of Justice CAVANAGH.

Leave to Appeal Granted December 18, 2008:

In re LEE (DEPARTMENT OF HUMAN SERVICES v LEE), No. 137653. The parties shall include among the issues to be briefed (1) whether the term

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[2] In *McDougall*, this Court considered a conflict between MRE 702, the court rule providing the standards of admissibility for expert testimony, and MCL 600.2169, which provides for stricter standards of admissibility for expert testimony in medical malpractice cases. *Id*. at 25-26.

"active efforts" in 25 USC 1912(d) requires a showing that there have been *recent* rehabilitative efforts designed to prevent the breakup of *that particular* Indian family; and (2) whether the "beyond a reasonable doubt" standard of 25 USC 1912(f) requires *contemporaneous* evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated.

The Clerk of the Court is directed to place this case on the March 2009 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than January 27, 2009, and appellees' brief and appendices, if appellees choose to submit appendices, must be filed no later than February 20, 2009.

The Attorney General and the American Indian Law, Children's Law, and Family Law sections of the State Bar of Michigan are invited to file briefs amicus curiae by February 24, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae by February 24, 2009. Court of Appeals No. 283038.

Summary Dispositions December 18, 2008:

PEOPLE v KEYES, No. 136839. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(F) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). After the Attorney General confessed error, a federal court granted defendant a conditional writ of habeas corpus, ordering the state of Michigan to both appoint counsel to represent him on appeal and "accept said appeal . . . for filing," or release him from custody. *Keyes v Renico*, 05-CV-71160-DT (2005). That order was not appealed. Habeas corpus decisions are binding on the parties, and the federal court retains jurisdiction to ensure compliance. *People v Frazier*, 478 Mich 231, 241-242 (2007), cert den sub nom *Michigan v Frazier*, ___ US ___; 128 S Ct 712; 169 L Ed 2d 571 (2007). In this case, counsel was appointed, and the federal district court issued an order granting further time for counsel to file an application or postjudgment motion. Counsel's pleadings were filed within the time set forth in the district court's order. Defendant's application for leave to appeal must, therefore, be accepted for filing. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. Court of Appeals No. 275280.

PEOPLE v BEMER, No. 136852. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall address whether a sentencing judge has discretion under MCL 777.22(1) and MCL 777.42(1) to purposely score offense variable 12 at zero points in

order to achieve a higher score under offense variable 13. We do not retain jurisdiction. Court of Appeals No. 284739.

KELLY, J. I would grant leave to appeal.

PEOPLE v WAUKEEN SPRAGGINS, No. 137205. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court for correction of the presentence investigation report as agreed to by the trial court, and for correction of the judgment of sentence to reflect two days' sentence credit for all of defendant's sentences. The circuit court shall forward a copy of the amended report to the Department of Corrections, MCL 771.14(6) and MCR 6.425(E)(2). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 282912.

KELLY, J. I would also remand this case for rescoring of offense variables 9 and 13.

PEOPLE v JAMES PERKINS AND PEOPLE v LESAGE, Nos. 137477 and 137478. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the Court of Appeals decision holding that Heidi's Law, MCL 257.625, does not violate the ex post facto provisions of the federal and state constitutions. Court of Appeals Nos. 281957 and 281959.

Leave to Appeal Denied December 18, 2008:

PEOPLE v KEITH FRANKLIN, No. 136166; Court of Appeals No. 283618.

PEOPLE v FILIP, No. 136275; Court of Appeals No. 277204.

PEOPLE v KINGSBURY, No. 136328; Court of Appeals No. 283342.

PEOPLE v BATES, No. 136562; Court of Appeals No. 284133.

PEOPLE v SESSIONS, No. 136568; Court of Appeals No. 283765.

PEOPLE v MICHAEL JAMES, No. 136717. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 282777.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted and would order the appointment of counsel in accordance with Administrative Order No. 2003-3.

PEOPLE v FLANORY, No. 136759; Court of Appeals No. 283235.

KELLY, J. I would grant leave to appeal.

PEOPLE v ROBERT LONG, No. 136856; Court of Appeals No. 285015.

PEOPLE v WHITSETT, Nos. 136862, 136863, and 136864; Court of Appeals Nos. 227294, 227295, and 227296.

PEOPLE v ROWLAND, No. 136911; Court of Appeals No. 284321.

PEOPLE v PINSON, No. 136912; Court of Appeals No. 283793.
KELLY, J. I would grant leave to appeal.

PEOPLE v DANIEL SANDERS, No. 136951; Court of Appeals No. 284764.
KELLY, J. I would grant leave to appeal.

PEOPLE v TUCKER, No. 137036; Court of Appeals No. 277650.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BISHOP, No. 137168; Court of Appeals No. 286366.
KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v UPCHURCH, No. 137179; Court of Appeals No. 285731.

PEOPLE v FULLER, No. 137185; Court of Appeals No. 285838.
KELLY, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v BRANDON COOK, No. 137214; Court of Appeals No. 285808.
KELLY, J. I would grant leave to appeal.

PEOPLE v OETMAN, No. 137257; Court of Appeals No. 283574.
KELLY, J. I would grant leave to appeal.

Summary Dispositions December 19, 2008:

ELLIS v FARM BUREAU INSURANCE COMPANY, No. 136069. On December 3, 2008, the Court heard oral argument on the application for leave to appeal the February 12, 2008, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for entry of judgment in favor of the defendant. Contracts are enforced according to their unambiguous terms. *Rory v Continental Ins Co,* 473 Mich 457, 468 (2005). The defendant is not liable, under the terms of the insurance policy, because, under the facts of this case, the insured premises were vacant or unoccupied for more than 60 consecutive days before the damage occurred. *Smith v Lumbermen's Mut Ins Co,* 101 Mich App 78 (1980), did not involve a vacancy of 60 days or more or policy language, such as that here, that limits coverage when the insured premises are vacant or unoccupied for more than 60 consecutive days. Court of Appeals No. 275240.

YOUNG, J. (*concurring*). I concur in the order reversing the judgment of the Court of Appeals and write solely to respond to the disturbing dissenting statement of Justice KELLY. This is a simple case that illustrates why judicial philosophy matters.

The insurance contract at issue disclaimed coverage for losses related to the insured home if it was "vacant and unoccupied beyond a period of 60 consecutive days." I wager that not one in a thousand native speakers of English would have difficulty in understanding this simple and straightforward contractual term. Notwithstanding, the premise of Jus-

tice KELLY's dissent is that these contractual terms are ambiguous because they are not defined in the insurance contract.* Only in a "judicial world" would two commonplace terms like "vacant" and "unoccupied" be deemed ambiguous, and only those who share Justice KELLY's philosophy of contract construction would make contracts containing those terms essentially unenforceable.

Unfortunately, I believe that Justice KELLY's view of contract construction in this case foreshadows the future. I predict that we will see again the ascendency of a Michigan jurisprudence in which no contract will be enforced according to its plain meaning and the meaning given to such commonplace terms will be derived entirely from the imaginations of judges who share Justice KELLY's judicial philosophy.

MARKMAN, J. (*concurring*). I concur in the decision to reverse the judgment of the Court of Appeals. I respond separately only to address Justice KELLY's dissent. That dissent contends that our reliance on *Rory v Continental Ins Co,* 473 Mich 457 (2005), is "sadly misplaced" because defendant admits that the insurance policy at issue here does not define the word "vacant" or "unoccupied," and, thus, "did not rely on *Rory* in its most recent brief." To begin with, defendant *did* rely on *Rory* in its brief in support of its application for leave to appeal,[1] and defendant very likely did *not* rely on *Rory* in its "most recent brief," i.e., its supplemental brief, only because this Court specifically directed the parties to "*not* submit mere restatements of their application papers" in their supplemental briefs. 482 Mich 1018 (2008) (emphasis added). Further, although defendant acknowledges that the dispositive terms of the policy are not defined in the policy, contrary to the dissent's suggestion, this by no means constitutes a concession that these terms are "ambiguous." "As this Court has repeatedly stated, the fact that a contract does not define a relevant term does not render the contract ambiguous." *Terrien v Zwit,* 467 Mich 56, 76 (2002). "Rather, if a term is not defined in a contract, we will interpret such term in accordance with its 'commonly used meaning.' " *Id*. at 76-77, quoting *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114 (1999). Finally, contrary to the dissent's intimation, a "term is not rendered ambiguous merely because resort to a dictionary reveals more than one definition." *Lash v Traverse City*, 479 Mich 180, 189 n 12 (2007).[2] "If that were the

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* If this were the prevailing rule of "ambiguity," then the so-called "plain language" movement of contract drafting is a cruel farce and insurance contracts would have to be accompanied by a "glossary" of everyday terms the size of the *Unabridged Oxford English Dictionary*.

[1] Const 1963, art 1, § 10.

[2] Even *plaintiff's* counsel admitted that the dispositive terms here are unambiguous, when he stated, "I guess I would have to concede that in the abstract vacant and unoccupied is not ambiguous." Oral argument transcript at 10. Contrary to the dissent's intimation, I *do* acknowledge that plaintiff's counsel proceeded to argue that the contract becomes

test for determining whether a term is ambiguous, then virtually all contracts would be rife with ambiguity and, therefore, subject to what the dissent in 'words mean whatever I say they mean' fashion describes as 'judicial interpretation.' " *Terrien, supra* at 76. For these reasons, I fully share Justice YOUNG's concerns about Justice KELLY's understanding of contract interpretation.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's order reversing the Court of Appeals judgment and concur with Justice KELLY's dissent.

Further, I note that if plaintiff had pleaded the issue of estoppel in her complaint, I would support granting plaintiff relief on that basis. At the time the insurance policy was issued, defendant's agent knew that no one was living in the house and that plaintiff intended to conduct extensive renovations before leasing it to a tenant. This Court has long held that "an insurance company is estopped from asserting a forfeiture for a condition of the premises existing at the time of the fire, which existed to the knowledge of the company at the making of the contract . . . ." *Gordon v St Paul Fire & Marine Ins Co*, 197 Mich 226, 234 (1917), relying on *Aurora Fire & Marine Ins Co v Kranich*, 36 Mich 289 (1877). See also *Johnson v American Fidelity Fire Ins Co*, 351 Mich 515, 521-522 (1958). *Gordon* and *Kranich* are factually and legally similar to this case, and would govern here if plaintiff had pleaded estoppel.

WEAVER, J. (*dissenting*). I dissent and would deny leave to appeal because I am not persuaded that the Court of Appeals judgment in this matter should be peremptorily reversed.

KELLY, J. (*dissenting*). I dissent from the Court's order peremptorily reversing the judgment of the Court of Appeals. The Court's reliance on *Rory v Continental Ins Co*[1] for the proposition that contracts are enforced according to their terms if the terms are unambiguous is sadly misplaced. In this case, the insurance policy admittedly did not define the terms "vacant" or "unoccupied." Both caselaw and the fact that numerous common definitions of the terms exist suggest that the terms are ambiguous.[2] Accordingly, they are subject to judicial interpretation, and

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ambiguous only when one considers that defendant's agent knew that the property was vacant, and, thus, it was reasonable for plaintiff to believe that the policy covered vacant properties. However, even *if* this was true, it is well established that " 'a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise,' " *Citizens Ins Co v Pro-Seal Service Group, Inc,* 477 Mich 75, 82 (2007) (citation omitted), and "one's alleged 'reasonable expectations' cannot supersede the clear language of a contract." *Wilkie v Auto Owners Ins Co,* 469 Mich 41, 60 (2003).

[1] *Rory v Continental Ins Co*, 473 Mich 457, 468 (2005).

[2] See, e.g., *Smith v Lumbermen's Mut Ins Co*, 101 Mich App 78 (1980); *Krajenke v Preferred Mut Ins Co*, 68 Mich App 211 (1976); *Shackelton v Sunfire Office*, 55 Mich 288 (1884).

Rory is inapplicable.[3] It is noteworthy that defendant did not rely on *Rory* in its most recent brief, likely because it admitted that the policy did not define the dispositive terms.

I believe that the Court of Appeals properly held that plaintiff's property was not vacant or unoccupied within the meaning of the terms

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Language is not rendered ambiguous merely because it is undefined in the contract in which it appears. But, ambiguity is more easily avoided if a contractual definition is provided. And the lack of a definition can contribute to the likelihood of ambiguity. Also, language is not ambiguous merely because a dictionary gives it more than one meaning. But where a dictionary shows that multiple commonly used meanings exist for the language, it signals that the language, if used without definition in a contract, risks being ambiguous.

Justice YOUNG's assertion that "only in a 'judicial world' would two commonplace terms like 'vacant' and 'unoccupied' be deemed ambiguous" is puzzling. In *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44 (2008), Justices YOUNG and MARKMAN joined the majority opinion that explicitly examined the meaning of the term "occupy" and recognized that, in *Webster's College Dictionary* alone, there are six definitions for the term. Notwithstanding what I believe to be the majority's erroneous determination that "occupy" was unambiguous in that case, *Liberty Hill* demonstrates that the term is subject to differing interpretations. *Liberty Hill* represents but the tip of an iceberg of cases interpreting the very terms Justices YOUNG and MARKMAN believe to be unambiguous to "native speakers of English." For a fervent discussion of over 100 pages of the myriad of cases that have interpreted "vacant" and "unoccupied" as they relate to insurance policies, I refer Justices YOUNG and MARKMAN to 47 ALR3d 398; 36 ALR3d 505. Furthermore, it appears that Justices YOUNG and MARKMAN would treat the terms "vacant" and "unoccupied" as one and the same. However, they are not synonymous, which may be why the policy used two terms instead of one. Each has meanings independent of the other.

Moreover, Justice MARKMAN distorts plaintiff's counsel's "admission" of a lack of ambiguity. The oral argument transcript shows that plaintiff's counsel admitted that the terms are not ambiguous "*in the abstract*" in response to Justice YOUNG's invitation to him to "[p]retend this is not an insurance contract; pretend this is some other contract." Oral argument transcript at 10. In fact, immediately following this so-called "admission," plaintiff's counsel stated, "It's when you put [the terms] into [an insurance contract] context that the ambiguity arises." *Id*.

[3] Notwithstanding this analysis, I continue to believe that *Rory* was wrongly decided for the reasons stated in my dissenting opinion in that case.

of the parties' insurance policy. I would leave its decision intact and deny defendant's application for leave to appeal.

DAVIS V FOREST RIVER, INC, No. 136114. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we hereby reverse the judgment of the Court of Appeals. For the reasons stated in the Court of Appeals dissenting opinion, the remedy of rescission under Michigan law is unavailable in this case. Further, this case is governed by the Uniform Commercial Code (UCC) as it involves a sale of goods. MCL 440.2102. We remand this case to the Court of Appeals for reconsideration of the issues involving the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*., that the court found it unnecessary to reach in light of its decision and to reconsider the applicability of the economic loss doctrine and the availability of revocation of acceptance under MCL 440.2608 in light of our holding that the UCC applies in this case. Court of Appeals No. 270478.

CAVANAGH, J. (*dissenting*). I dissent from the majority's hasty dispatch of this case through an order. I find this disposition wholly inadequate given the complexity of the jurisprudentially significant issues on which this Court granted leave to appeal. The order is so unclear that I am unable to detect whether I disagree with its holdings, let alone its reasoning.

First, the order reverses the Court of Appeals and states that the remedy of rescission is unavailable in this case for the reasons stated in the Court of Appeals dissent. This is the only statement in the order bearing any resemblance to judicial reasoning, and even this is more confusing than illuminating. It is unclear if the majority is reversing the entire Court of Appeals holding or just its remedy.[1] It is also unclear which part of the Court of Appeals dissent the majority intends to incorporate.[2] The order cannot be read as adopting the Court of Appeals dissent in its entirety because the dissent argued that the Uniform

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[1] The Court of Appeals held that plaintiff was entitled to rescission for defendant's breach of implied warranty because (1) Michigan law long ago established that purchasers may seek the remedy of rescission against remote, out-of-privity manufacturers for breach of implied warranty; (2) the Uniform Commercial Code (UCC) and the economic loss doctrine are inapplicable to this case because the parties were not in privity; and (3) the UCC only abolished rescission as a remedy where the parties have a contract. *Davis v Forest River*, *Inc*, 278 Mich App 76, 91 (2008).

[2] The Court of Appeals dissent reasoned that: (1) a plaintiff cannot seek rescission as a remedy for an implied warranty because there is no contract to rescind; (2) the UCC remedy of revocation of acceptance replaced rescission for out-of-privity plaintiffs; and (3) the UCC only applies if the parties are in privity. *Davis*, 278 Mich App at 92-94 (BANDSTRA, J., dissenting).

Commercial Code (UCC) does not apply to this transaction and the order expressly rejects that proposition in its next sentence. This provision provides the Court of Appeals and the parties with insufficient guidance on what law, if any, the order establishes in these areas.[3]

Second, the order states that "this case is governed by the Uniform Commercial Code (UCC) as it involves a sale of goods." It then provides a bare citation of MCL 440.2102. Section 2102 states that "[u]nless the context otherwise requires, this article applies to transactions in goods." This statement and the citation of this statute add no value to this case as neither the lower courts nor the parties have contested that this action involves a sale of goods. The statement also fails to provide the parties any useful guidance on the issues in this case pertaining to the UCC, including whether the relevant UCC provisions require privity and to what extent plaintiff's third-party beneficiary status enables him to seek relief under the UCC.

Third, the order directs the Court of Appeals to consider if revocation of acceptance is available "in light of our holding that the UCC applies in this case." I am unclear what purpose this instruction serves. Both the majority and the dissent in the Court of Appeals already stated that the UCC remedy of revocation of acceptance is not available absent privity. As stated earlier, the order's inadequate statement that "the UCC applies" provides no useful guidance on how to apply the provisions of the UCC at issue in this case. Therefore, the order essentially directs the Court of Appeals to answer a question that it has already answered, without providing any new holding or legal reasoning that would give the Court of Appeals reason to reconsider its original holding. Apparently the efforts that the parties and lower courts already expended on this issue were a waste of their time, as well as of this state's limited judicial resources.

I find it unacceptable for this Court to direct the Court of Appeals and the parties to readdress these issues with only the confusing and inadequate "guidance" this order provides. This Court should provide clarity, not confusion, to the courts below. The questions this order fails to address are not theoretical; to the contrary, the questions are directly necessary for resolution of this case.[4] Accordingly, I dissent.

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[3] The order fails to provide guidance or resolution on several questions that may have an effect on the outcome of this case and that were already addressed by the Court of Appeals. For example: Does Michigan statutory or common law provide a cause of action for a breach of warranty when the parties are not in privity? Is rescission available as a remedy for defendant's breach of its express warranty? Did the UCC's remedy of revocation of acceptance supplant the equitable remedy of rescission? If so, did it do so only when parties are in privity, whenever the UCC applies, or in general?

[4] Indeed, many are the questions this Court asked the parties to address in its order granting leave to appeal. *Davis v Forest River, Inc*, 481 Mich 918 (2008).

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

PEOPLE v JUSTIN HOWARD, No. 136238. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Jackson Circuit Court and remand this case to that court for resentencing. The trial judge failed to offer any valid explanation justifying why he chose to sentence the defendant to a term of life imprisonment. *People v Smith*, 482 Mich 292 (2008). On remand, the trial court shall articulate on the record why this level of departure is warranted or resentence the defendant either within the appropriate sentencing guidelines range or articulate on the record why a different level of departure is warranted. We do not retain jurisdiction. Court of Appeals No. 282577.

KELLY, J. (*concurring*). I concur fully in the remand order. I write separately only to respond to concerns raised by Justice CORRIGAN in her dissenting statement.

First, I emphasize that resentencing is required here because, as the remand order states, the trial judge did not explain why he sentenced defendant to a term of life imprisonment. The sentence was handed down before this Court released *People v Smith*;[1] therefore, the trial judge may not have thought it necessary to express why substantial and compelling reasons justified the departure he chose.[2]

I disagree with Justice CORRIGAN that the trial court cannot comply with *Smith*. First, Justice CORRIGAN ties many of her concerns to *Smith*'s suggestion that a trial court could compare its departure sentence "against the sentencing grid and anchor[] it in the sentencing guidelines." Justice CORRIGAN seizes on this language to argue that a sentencing court could "mathematically justify almost any conceivable sentence" when the only pertinent question is whether a substantial and compelling reason justifies the sentence imposed.[3]

Smith's mention of the sentencing grid provides guidance for sentencing courts. It shows how reference to the grid may be helpful when explaining why a substantial and compelling reason justifies a particular departure sentence. I note also that *Smith* merely stated that "*[o]ne potential means* of offering such a justification is to place the specific facts of a defendant's crimes in the sentencing grid."[4] Later in the opinion, the Court noted that "a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing

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[1] *People v Smith*, 482 Mich 292 (2008).

[2] Justice CORRIGAN "cannot imagine" what more the trial judge could have done to comply with the requirements of *Smith* and "fear[s] that providing meaningful further articulation will be impossible in practice." But the trial judge has not yet had the opportunity to comply with *Smith*. I reiterate that "[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id.* at 304.

[3] MCL 769.34(3).

[4] *Smith*, *supra* at 306 (emphasis added).

range grid."[5] This guidance assists, rather than impedes, a sentencing court by showing one method of applying the requirements of *Smith* to a sentence. Also, it undercuts Justice CORRIGAN's implicit assumption that a reviewing court will uphold a sentence only if the sentencing judge refers to mathematical support for its departure sentence.

In this case, the sentencing judge referenced defendant's previous sexual assaults against this victim and against defendant's sister. Defendant's prior assault on his sister was part of the decision to score five points for prior record variable 5 (PRV 5), raising defendant's guidelines range. Justice CORRIGAN opines hypothetically that a sentencing court could use the same prior crimes as the basis for a departure; she then notes that a sentencing court that does so would contravene the statutory language by counting those offenses twice in two mutually exclusive categories. Such a hypothetical situation is not now before the Court. Moreover, I believe that effective appellate review would correct any such abuse of discretion. By requiring judges to provide additional explanation for departure sentences, *Smith* provides more, not less, record information from which an appellate court can identify an abuse of discretion.

Second, Justice CORRIGAN recites the circumstances surrounding the charged offense in this case that the judge mentioned as a basis for departure at sentencing. She then concludes that using those facts to add a significant number of additional points to defendant's offense variable (OV) score is unhelpful. A mere 20 additional points would place defendant in OV level VI—the highest level on the grid. Such a score would set defendant's minimum sentence under the guidelines at $10\frac{1}{2}$ to $17\frac{1}{2}$ years. Therefore, Justice CORRIGAN reasons, the guidelines "do not directly contemplate a minimum sentence over $17\frac{1}{2}$ years for this defendant, regardless of how many additional aggravating factors were present."

However, *Smith* explicitly stated that, if a defendant had an OV score above 100, "the court may render a proportionate sentence above the highest minimum for someone with a similar PRV score" because "the Legislature did not contemplate a defendant with such a high OV score, given that it used 100 OV points as the maximum for the grid."[6]

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[5] *Id.* at 309. *Smith* also repeatedly rejected "mathematical certainty," "mathematical precision," or "a rigid mathematical formula" in determining sentences. See *id.* at 311, 315-316. Justice CORRIGAN complains that "[i]f a court cannot quantify the reasons for departure because they are not contemplated by the guidelines," the court will be unable to explain why the particular departure from the guidelines is justified. But *Smith* allows a sentencing court to use means to justify a departure sentence other than referencing the sentencing grid or making a quantifiable analysis. For example, "a comparison of a defendant's characteristics and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence is a valuable exercise." *Id.* at 310.

[6] *Id.* at 308-309.

Therefore, in this case, the trial judge's burden would be to explain why the aggravating factors justified a life sentence. I do not share Justice CORRIGAN's concerns that *Smith* effectively ties the hands of a sentencing judge who wishes to depart from the guidelines. Certainly, in this case, the sentencing judge has yet to even attempt to justify the extent of the departure.

Finally, Justice CORRIGAN provides a number of shocking details about the "cruelty" that defendant inflicted on the victim. I agree that the crime was very disturbing. However, I believe that her assertion that "a life sentence appears entirely appropriate in light of defendant's history and the circumstances of this crime" supports disagreement with *Smith*[7] more than her conclusion that the trial judge will be unable to conform to the requirements of *Smith*.

I continue to believe that *Smith*'s interpretation that MCL 769.34(3) requires a sentencing judge to justify the basis for "the departure it made and not simply *any* departure it might have made"[8] is appropriate. Moreover, it is mandated by the language of the statute. Therefore, I concur in the Court's order remanding this case for resentencing in light of *Smith*.

WEAVER, J. (*dissenting*). I would deny leave to appeal for the reasons set forth in my dissenting statement in *People v Smith*, 482 Mich 292, 325-329 (2008).

CORRIGAN, J. (*dissenting*). I would grant leave in this case and in that of the codefendant, see *People v Kurtz,* 482 Mich 1131 (2008), to reconsider the burdensome requirements imposed on sentencing courts by *People v Smith*, 482 Mich 292 (2008). This child rape case demonstrates that *Smith* is unworkable. The trial judge adequately justified the life sentence he imposed. Most significantly, I cannot fathom how the trial court can comply with *Smith*. First, I cannot conceive of a way to justify the departure mathematically by reference to the sentencing guidelines

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[7] Justice CORRIGAN's dissent in *Smith* similarly discussed gruesome details of the crime and the harm suffered, including many particulars not cited by the trial court as a basis for departure at sentencing. *Id.* at 317; *id.* at 339-345 (CORRIGAN, J., dissenting). The majority opinion in *Smith* agreed that the crime was "heinous," *id*. at 311, but also unequivocally stated: "A departure cannot be justified on the sole basis that a crime is heinous. All criminal-sexual-conduct cases involving young children are heinous." *Id.* at 311 n 42.

I note that this point is underscored by Justice CORRIGAN's response to this concurrence. She claims that "[r]emand for further articulation thus also wastes precious time and scarce resources." I can certainly appreciate her concerns about judicial economy. But I would rather allow the trial judge to attempt to correctly apply the law than deny leave to appeal solely because of hypothetical, and I believe unfounded, concerns about *Smith*.

[8] *Smith, supra* at 318 (emphasis in original).

where the defendants' rape of one defendant's disabled 11-year-old daughter was "off the charts" with regard to cruelty and where this defendant's prior assaults on young girls militated in favor of a term of life imprisonment. Second, in response to Justice KELLY's concurring statement, although *Smith* does not absolutely *require* a mathematical analysis, I cannot imagine what more the trial judge here could have done to otherwise comply with *Smith*.

The assaults in this case were against the 11-year-old daughter of defendant's girlfriend, who is the codefendant in the underlying case. The child normally lived with her father and paternal grandmother during the week, but stayed with her mother and defendant on weekends. She is physically and mentally disabled as a result of cerebral palsy and epilepsy. One weekend, her mother invited defendant to have sex with the girl, as he had once before. Defendant admitted that he fondled the child's breasts and penetrated her vagina with his fingers and penis. The child asked him to stop while the codefendant mother facilitated the rape by holding her daughter's legs open and spitting on defendant's penis for lubrication. The defendants also used a cell phone to take sexually explicit pictures of the child.

When the defendant mother returned the child to her grandmother's home the next day, the mother attempted to conceal the rape by telling the grandmother that the child might "tell her a story." The mother stated that she and defendant were having sex on the floor next to the child's bed when the child awoke, witnessed them, and began to cry. Nonetheless, the grandmother took the child to the hospital after the child told her that defendant had "stuck" his penis "inside [her] crotch." The medical examination revealed that the child's vagina was bruised, torn, and bleeding. Defendant later told the police that he had raped the child on a prior occasion under similar circumstances.

The defendants' acts could have justified multiple convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age), and child sexually abusive activity, MCL 750.145c(2). For each defendant, the prosecutor agreed to dismiss a single count of child sexually abusive activity in return for the defendant's guilty plea to one count of CSC I.

The presentence investigation report states that defendant showed "no remorse or concern" for the victim but was "more angry that he was caught and punished." The investigation also revealed that defendant, who was an adult at the time of the instant crimes, had a record of juvenile offenses, including sexually assaulting his younger sister on three or four occasions. He admitted that his sister would tell him to stop and would sometimes cry. He had been placed on probation for the assaults, but had violated his probation several times, including by taking nude photos to school and pulling down the pants of two boys.

The maximum sentence for CSC I is life in prison. The legislative sentencing guidelines recommended a minimum sentence range for defendant of 108 to 180 months (9 to 15 years). The judge opined that the guidelines range was inadequate for several reasons and departed from it, as permitted by MCL 769.34(3), imposing a parolable life sentence. Addressing defendant, the judge stated:

> [T]he guidelines, in the Court's opinion, do not adequately reflect that you knew that the victim was an 11 year old girl with the mental capacity of a seven year old, in addition to having physical problems, having cerebral palsy and epilepsy. The guidelines do not, in the Court's opinion, adequately consider that the child's mother had to hold the victim's legs open so that you could penetrate her with your penis.
>
> The guidelines also do not adequately consider that you were also involved in the taking of sexual [sic] explicit pictures of the victim. Additionally, in the Court's opinion, the guidelines do not adequately reflect that this is your second sexually assaultive behavior on your part within a relatively short period of time and that you had previously had [sic] sexually assaulted your little sister about six years ago and received counseling thereafter, which apparently didn't do a whole lot of good.
>
> The sentence of the Court, all that having been said, is that you spend the rest of your life in prison.

As in the case of the defendant mother, I believe the judge offered an adequate "substantial and compelling reason," MCL 769.34(3), to impose a life sentence under the circumstances of this case and where defendant is a repeat sex offender. Indeed, the judge offered several reasons for departure. Most significantly, I cannot see how the judge on remand could further explain the departure under *Smith*.

Smith, *supra* at 318, centrally suggests that a trial court should compare its departure sentence "against the sentencing grid and anchor[] it in the sentencing guidelines." Here defendant's five prior record variable (PRV) points and 80 offense variable (OV) points placed him in the B-V range for Class A offenses, calling for a minimum sentence of 108 to 180 months. MCL 777.62. Yet, first, defendant's record revealed a pattern of sexual assaults that were not accounted for, including several against his sister and a prior assault on the current victim. Defendant's lack of reform and likelihood of reoffending is highly relevant to an appropriate sentence. One could argue under *Smith* that, if defendant had been convicted as an adult of each sexual assault he admitted committing, his record would reflect three or more prior high severity felonies justifying a score of at least 75 points under PRV 1. MCL 777.50. This alone would place him in the F-V range, which explicitly allows a minimum sentence of life in prison. But I think that we thwart the guidelines if we effectively allow courts to score additional points for nonexistent offenses and particularly for offenses that explicitly justify lower scores under other variables. Here, for example, defendant's prior sexual assaults of his sister were subsumed into a single juvenile assault adjudication that was scored under PRV 5. The assault adjudication and a second juvenile adjudication for retail fraud together resulted in a five-point score for PRV 5. Thus, if we hypothetically count the sexual assaults of his sister as felonies for purposes of a departure rationale, we contravene the statutory language and effectively count the assaults

twice in two mutually exclusive categories. Significantly, I suspect that a court could mathematically justify almost any conceivable sentence in this way by extending or hypothetically rescoring the guidelines to explain a departure. It is in part for this reason that I find *Smith* unworkable. To illustrate, here the substantial and compelling nature of defendant's prior crimes lies in their character as a pattern of admitted sexual assaults on young, unwilling girls. Their nature supports a lengthy prison sentence for the same reasons such a sentence is explicitly called for by the guidelines when an offender is convicted of multiple prior felonious sexual assaults. But the prior crimes arguably would *not* similarly justify a life sentence if they had been mere uncharged acts akin to *unrelated* felonies such as drug offenses or crimes against property. Yet, arguably, a sentencing judge could "count" such hypothetical felonies in the same way I "counted" the prior sexual assaults here in an attempt to justify a life sentence.

The only pertinent question under MCL 769.34(3) is whether a "substantial and compelling reason" justifies the sentence imposed—not whether a court can hypothesize mathematical support for its departure. And I would argue that the Legislature's actual formulation has a well-supported rationale. Here, the substantial and compelling reason to depart was defendant's unremitting sexual assaults on young girls, for which he apparently showed no remorse or reform despite prior punishment. In citing this reason, the trial judge offered an objective and verifiable fact that "keenly" or "irresistibly" grabs our attention and clearly is of "considerable worth in deciding a sentence." *People v Babcock*, 469 Mich 247, 257 (2003) (citation and quotation marks omitted). The judge thus *meaningfully* fulfilled his duty to "consider whether [his] sentence is proportionate to the seriousness of the defendant's conduct and his criminal history . . . ." *Id.* at 264. It would have been considerably less meaningful—and arguably *unlawful*—if he had concocted a guidelines calculation providing for a life sentence by effectively scoring variables that, by their terms, were not supported by the record.

Second, the judge cited defendant's exploitation of a disabled child and stressed that the rape required the mother to hold the child's legs open. Defendant's 80-point OV score included 10 points for OV 10 as is appropriate when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.40(1)(b). But, here, defendant exploited the victim's physical disability, mental disability, youth *and* a domestic relationship. Should we multiply 10 points by these four attributes? A 40-point score for OV 10 would place defendant in the B-VI range, which calls for a minimum sentence of 126 to 210 months ($10\frac{1}{2}$ to $17\frac{1}{2}$ years). Defendant also received the maximum 10-point score for OV 4 (psychological injury requiring treatment). In light of this rape of a child by her own mother and a live-in boyfriend, which required physical manipulation of the child because of her cerebral palsy, should the score for psychological injury be doubled? Tripled? Either way it matters not because the 30 additional points "under" OV 10 already would have placed defendant in the highest OV range—level VI

on the grid. Thus, the guidelines do not directly contemplate a minimum sentence over 17½ years for this defendant, regardless of how many additional aggravating factors were present.

As I observed in my dissent in *Smith*, the very fact that the Legislature allows sentencing judges to depart from the guidelines shows that the guidelines are incapable of taking some factors into account. The Legislature thus expressly relies on a judge's ability to weigh such circumstances.

> [D]eparture sentences should by definition be governed by a different standard than sentences within the guidelines range. By choosing to permit judges to "depart" from the guidelines range for unusual offenses, the Legislature contemplated a less stringent standard of uniformity for unusual offenses, which should because of their nature be treated differently. Departure sentences generally involve less quantifiable facts that are not adequately covered by the normative guidelines. [*Smith, supra* at 338 (CORRIGAN, J., dissenting).]

Finally, as Justice KELLY observes, under *Smith* a sentencing court nonetheless "is not *required* to consider where a defendant's sentence falls in the sentencing grid." *Smith, supra* at 309. Rather, *Smith* permits the court to "render a proportionate sentence above the highest minimum for someone with a similar PRV score" because "the Legislature did not contemplate a defendant with such a high OV score, given that it used 100 OV points as the maximum for the grid." *Smith, supra* at 308-309. Justice KELLY thus concludes: "Therefore, in this case, the trial judge's burden would be to explain why the aggravating factors justified a life sentence." *Ante* at 1127. Her conclusion exemplifies the central problem with *Smith* as applied: If a court cannot quantify the reasons for departure because they are not contemplated by the guidelines, what more can a court do to "explain why" the reasons for departure justify the sentence imposed? Here, what more could the court have done to justify a life sentence after recounting the circumstances of the crime, noting defendant's past sexual assaults, and recognizing that defendant failed to reform despite prior punishment and counseling? In cases such as this one, I fear that providing meaningful further articulation will be impossible in practice.

In sum, I think that the trial judge fully complied with MCL 769.34(3) in this case and that a remand for further articulation under *Smith* imposes an unnecessary and potentially impossible task. Significantly, although a life sentence appears entirely appropriate in light of defendant's history and the circumstances of this crime, I am not convinced that the trial judge could ever impose a life sentence while conforming to the *Smith* requirements. Remand for further articulation thus also wastes precious time and scarce resources. For these reasons, I would grant leave to appeal so as to reconsider *Smith*.

PEOPLE V KURTZ, No. 136262. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Jackson Circuit

Court and remand this case to that court for resentencing. The trial judge failed to offer any valid explanation justifying why he chose to sentence the defendant to a term of life imprisonment. *People v Smith*, 482 Mich 292 (2008). On remand, the trial court shall articulate on the record why this level of departure is warranted or resentence the defendant either within the appropriate sentencing guidelines range or articulate on the record why a different level of departure is warranted. We do not retain jurisdiction. Court of Appeals No. 283580.

KELLY, J. (*concurring*). I concur fully in the remand order. I write separately only to respond to concerns raised by Justice CORRIGAN in her dissenting statement.

First, I emphasize that resentencing is required here because, as the order states, "[t]he trial judge failed to offer any valid explanation justifying why he chose to sentence the defendant to a term of life imprisonment." The sentence in this case was handed down before the Court released its opinion in *Smith*;[1] therefore, the trial judge may not have thought it necessary to express why the particular departure he chose was justified by substantial and compelling reasons.[2] Our order expresses no opinion on the validity of the reasons the trial judge gave for departing from the guidelines.

Given the circumstances, I believe that there is an inadequate basis to assert, as Justice CORRIGAN does, that the trial judge could never impose a life sentence while conforming to the *Smith* requirements. Justice CORRIGAN ties many of her concerns to *Smith*'s suggestion that a trial court could compare its departure sentence "against the sentencing grid and anchor[] it in the sentencing guidelines."[3] She notes the trial judge's reference at sentencing to the nature of the crime and the damage caused to defendant's child as substantial and compelling reasons to depart. But Justice CORRIGAN fails to point to anything in the record indicating why the sentencing judge believed that a life sentence was appropriate. *Smith* requires that the trial judge explain why a lesser departure would be disproportionate to the defendant's criminal history and the seriousness of defendant's conduct.

In this case, Justice CORRIGAN recites the facts surrounding the charged offense that the trial judge mentioned as a basis for departure. She then concludes that using those facts to add a significant number of additional points to defendant's offense variable (OV) score is unhelpful. She states that a mere 10 additional points would place defendant in OV

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[1] *People v Smith*, 482 Mich 292 (2008).

[2] Justice CORRIGAN questions what more the trial judge could have done to comply with the requirements of *Smith* and "fear[s] that providing meaningful further articulation will be impossible in practice." But, the court has not yet had the opportunity to comply with *Smith*. I reiterate that "[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id.* at 304.

[3] *Id*. at 318.

level VI—the highest level on the grid. Such a score would set defendant's minimum sentence under the guidelines at 11¼ to 18¾ years. Therefore, she reasons, "it is essentially impossible to anchor a departure in the guidelines based on the degree to which OV 10 failed to adequately contemplate the circumstances of the crime."

To the contrary, *Smith* explicitly stated that, if a defendant has an OV score above 100, "the court may render a proportionate sentence above the highest minimum for someone with a similar PRV score" because "the Legislature did not contemplate a defendant with such a high OV score, given that it used 100 OV points as the maximum for the grid."[4] Therefore, in this case, the trial judge's burden is to explain why the aggravating factors it identified justified a sentence of life in prison. I do not share Justice CORRIGAN's concerns that *Smith* effectively ties the hands of a sentencing judge who wishes to depart from the guidelines. Certainly, in this case, the sentencing judge has yet to even attempt to justify the extent of the departure.[5]

I continue to believe that *Smith*'s interpretation of MCL 769.34(3), requiring a sentencing judge to justify the basis for "the departure it made and not simply *any* departure it might have made,"[6] is appropriate. Moreover, it is mandated by the language of the statute. Therefore, I concur in full in the Court's order remanding this case for resentencing in light of *Smith*.

WEAVER, J. (*dissenting*). I would deny leave to appeal for the reasons set forth in my dissenting statement in *People v Smith*, 482 Mich 292, 325-329 (2008).

CORRIGAN, J. (*dissenting*). I would grant leave in this case and in that of the codefendant, see *People v Howard*, 482 Mich 1125 (2008), to reconsider the burdensome requirements imposed upon sentencing courts by *People v Smith*, 482 Mich 292 (2008). For the reasons I explain in *Howard,* this child rape case demonstrates that *Smith* is unworkable.

Defendant is the mother of a disabled 11-year-old girl. As I fully explain in *Howard,* defendant encouraged and facilitated her codefendant boyfriend's rape of her daughter on at least two occasions. The codefendant proceeded to penetrate the girl's vagina with his fingers and penis only after defendant assured him that he would not get in trouble and the child would not tell anyone. When defendant returned the child to her grandmother's home the next day, defendant attempted to conceal the rape by telling the grandmother that the child might "tell her a

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[4] *Id.* at 308-309.

[5] Justice CORRIGAN's response to this concurrence claims that "[r]emand for further articulation thus also wastes precious time and scarce resources." I can certainly appreciate her concerns about judicial economy, but I would rather allow the trial judge to attempt to correctly apply the law than deny leave to appeal solely because of hypothetical, and I believe unfounded, concerns about *Smith*.

[6] *Smith, supra* at 318.

story." Defendant admitted that she knew that her daughter had been injured because defendant saw bleeding between her daughter's legs.

The defendants' acts would have justified multiple convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age), and child sexually abusive activity, see MCL 750.145c(2). For each defendant, the prosecutor agreed to dismiss a single count of child sexually abusive activity in return for the defendant's guilty plea to one count of CSC I.

The presentence investigation report states that defendant had 12 prior misdemeanors and was on probation at the time of the instant offense. Her prior convictions included contributing to the delinquency of a minor and domestic violence. The Department of Corrections recommended the maximum allowable term of incarceration for defendant, opining in part that the victim "will live the rest of her life knowing the one person who should have loved her more than life, [sic] betrayed her. It will remain to be seen if [the victim] will ever trust another person."

The maximum sentence for CSC I is life in prison. The legislative sentencing guidelines recommended a minimum sentence range for defendant of 126 to 210 months (10½ to 17½ years). The judge opined that the guidelines range was inadequate for several reasons and departed from it, as permitted by MCL 769.34(3), imposing a parolable life sentence. The judge opined:

> The court's deviating over the guidelines as in the Court's opinion the guidelines do not adequately consider that the child . . . was only 11 years of age at the time but had the mental capacity of a seven year old.
>
> The guidelines also do not adequately consider, in the Court's opinion, that the victim had cerebral palsy and that the defendant, because of the physical handicap, held her daughter's legs open to allow Mr. Howard [the codefendant] to achieve penetration and that this happened on two separate occasions.
>
> The guidelines also do not adequately consider that the defendant was taking sexually explicit photos of the victim for whatever reason, which is unclear to the Court. The guidelines also do not adequately consider, in the Court's opinion, the short and long-term psychological effects upon the child who, even now, misses the mother and wants to see her. This is simply abhorrent behavior.
>
> The sentence of the Court deviating over the guidelines, which the Court thinks is appropriate, is that the defendant spend the rest of her life in prison . . . .

As in the case of the codefendant, I think the judge offered an adequate "substantial and compelling reason," MCL 769.34(3), to impose a life sentence for this mother who solicited and participated in the abuse and exploitation of her disabled child on more than one occasion. Indeed,

the judge offered several reasons to depart. Most significantly, I cannot see how the judge on remand could further explain the departure under *Smith*.

Smith, *supra* at 318, centrally suggests that a trial court should compare its departure sentence "against the sentencing grid and anchor[] it in the sentencing guidelines." Here defendant's 20 prior record variable (PRV) points and 90 offense variable (OV) points placed her in the C-V range for Class A offenses, calling for a minimum sentence of 126 to 210 months. MCL 777.62. This case differs from that of the codefendant because defendant did not have a history of sexual assault. But the trial judge reasonably points to the nature of the crime and to the damage caused to defendant's child as substantial and compelling reasons to depart. Defendant exploited her own disabled child while the child was in her care. Indeed, defendant offered the child to her boyfriend and encouraged and facilitated the rape. If these circumstances do not "keenly" and "irresistibly" grab our attention, *People v Babcock,* 469 Mich 247, 257 (2003) (citation and quotation marks omitted), I cannot imagine what would. By emphasizing the serious nature and results of this abuse, the judge meaningfully fulfilled his duty to "consider whether [the] sentence is proportionate to the seriousness of the defendant's conduct and [her] criminal history . . . ." *Id.* at 264.

Next, as in the codefendant's case, defendant received a 10-point score for OV 10 as is appropriate when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.40(1)(b). But defendant exploited the victim's physical disability, mental disability, youth, domestic relationship and authority status *as the child's own mother* by offering up her child for rape. Is it enough to multiply 10 points by these five attributes? A 50-point score for OV 10 would give defendant a total of 130 OV points, but such a score would make little difference in her prescribed minimum sentence range; her 90-point OV score already placed her in the second highest OV category, so only 10 additional points places her in the highest OV category for 100 points or more. This would place defendant in the C-VI range, which calls for a minimum sentence of 135 to 225 months ($11\frac{1}{4}$ to $18\frac{3}{4}$ years). Thus, it is essentially impossible to anchor a departure in the guidelines based on the degree to which OV 10 failed to adequately contemplate the circumstances of the crime. Similarly, defendant received the maximum 10-point score for OV 4 (psychological injury requiring treatment). But because the OV category maxes out, so to speak, if only 10 points are added to her 90-point score, it is impossible to calculate what sentence would be appropriate if both OV 10 and OV 4 could be scored at a number of points more applicable to this crime.

As I observed in my dissent in *Smith* and my statement in the codefendant's case, the very fact that the Legislature allows sentencing judges to depart from the guidelines shows that the guidelines are incapable of taking some factors into account. The Legislature thus expressly relies on a judge's ability to weigh such circumstances.

> [D]eparture sentences should by definition be governed by a different standard than sentences within the guidelines range. By choosing to permit judges to "depart" from the guidelines range for unusual offenses, the Legislature contemplated a less stringent standard of uniformity for unusual offenses, which should because of their nature be treated differently. Departure sentences generally involve less quantifiable facts that are not adequately covered by the normative guidelines. [*Smith, supra* at 338 (CORRIGAN, J., dissenting).]

Finally, as Justice KELLY observes, under *Smith* a sentencing court nonetheless "is not *required* to consider where a defendant's sentence falls in the sentencing grid." *Smith, supra* at 309. Rather, *Smith* permits the court to "render a proportionate sentence above the highest minimum for someone with a similar PRV score" because "the Legislature did not contemplate a defendant with such a high OV score, given that it used 100 OV points as the maximum for the grid." *Smith, supra* at 308-309. Justice KELLY thus concludes: "Therefore, in this case, the trial judge's burden is to explain why the aggravating factors it identified justified a sentence of life in prison." *Ante* at 1133. Her conclusion exemplifies the central problem with *Smith* as applied: If a court cannot quantify the reasons for departure because they are not contemplated by the guidelines, what more can a court do to "explain why" the reasons for departure justify the sentence imposed? Here, what more could the court have done to justify a life sentence after describing defendant's "abhorrent behavior" in offering up her own disabled daughter for rape? In cases such as this one, I fear that providing meaningful further articulation will be impossible in practice.

In sum, I think that the trial judge fully complied with MCL 769.34(3) in this case and a remand for further articulation under *Smith* imposes an unnecessary and potentially impossible task. Significantly, although a life sentence appears entirely appropriate in light of the circumstances of this crime and defendant's role as the victim's mother, I am not convinced that the trial judge could ever impose a life sentence while conforming to the *Smith* requirements. Remand for further articulation thus also wastes precious time and scarce resources. For these reasons, I would grant leave to appeal so as to reconsider *Smith*.

CHAMBERS V WAYNE COUNTY AIRPORT AUTHORITY, No. 136900. On December 3, 2008, the Court heard oral argument on the application for leave to appeal the June 5, 2008, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Wayne Circuit Court for entry of an order of judgment for the defendant. Court of Appeals No. 277900.

CAVANAGH, J. (*dissenting*). I dissent from the majority's peremptory reversal of the Court of Appeals judgment in this case. I would affirm the Court of Appeals or grant leave to appeal for proper consideration.

The majority's order reverses "for the reasons stated in the Court of Appeals dissenting opinion." But that opinion appears to contain analytical errors. First, the Court of Appeals dissent appears to assume that the statute requires a written notice. Because the statute does not expressly require that the notice must be written, I would not leap to such an assumption. Second, the Court of Appeals dissent assumes that the statute requires that notice be made by formal service of process. Given that the section of the statute addressing service of process appears discretionary, I would not hastily adopt a contrary conclusion.

Additionally, the Court of Appeals dissent relies on *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007). But *Rowland* addressed a notice that was given after the statutory period for notice had elapsed. In the present case, plaintiff's verbal notice was given well within the statutory period. Thus, *Rowland* is distinguishable. Because *Rowland* is contrary to the longstanding jurisprudence of this Court on what constitutes sufficient notice under a statute such as MCL 691.1406, I would not extend *Rowland* beyond its facts. See, e.g., *Meredith v City of Melvindale,* 381 Mich 572, 579-580 (1969) (notice from "inexpert layman" should be liberally construed and not to be found insufficient for "some technical defect"); *Brown v City of Owosso,* 126 Mich 91, 95 (1901) (notice is sufficient if it is understandable and brings the important facts to a defendant's attention).

Accordingly, I respectfully dissent.

WEAVER, J. (*dissenting*). I dissent and would deny leave to appeal because I am not persuaded that the Court of Appeals judgment in this matter should be peremptorily reversed.

KELLY, J. (*dissenting*). I would grant leave to appeal to reconsider *Rowland v Washtenaw Co Rd Comm*.[1]

PEOPLE v POOLE, No. 137032. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the December 13, 2007, judgment of sentence of the Genesee Circuit Court, and we remand this case to the trial court for further proceedings. The trial court imposed a prison sentence where the sentencing guidelines required an intermediate sanction, and the court stated that it did not intend to depart from the guidelines range. On remand, if the trial court again revokes probation, it shall sentence defendant to an intermediate sanction or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with MCL 769.34(4)(a) and *People v Babcock*, 469 Mich 247 (2003). Finally, the trial court agreed to make changes to the presentence report that are not reflected therein. On remand, the trial court shall perform this ministerial act. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 285219.

KELLY, J. (*concurring in part and dissenting in part*). For over 38 years, Michigan law has been that, when determining whether to revoke probation, the court considers only evidence related to the charged

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[1] *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197 (2007).

violation of the probation order. It has been clearly established that only such evidence may provide a basis for the decision.[1] The judge in this case violated that rule. Defendant was charged with violating the terms of his probation by failing to report to his probation officer. The judge based his decision to revoke probation, in part, on assault charges brought against defendant in a separate, unrelated case.[2] But defendant had been acquitted of those charges. Hence, the alleged assault should not have been considered because it was not charged in this matter and because, in the eyes of the law, defendant was not guilty of it.

I would vacate the order revoking probation and remand the case with instructions to the judge to consider only the evidence relating to defendant's failure to report to his probation officer.

Leave to Appeal Denied December 19, 2008:

ROBERSON BUILDERS, INC v LARSON, No. 132363. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of February 1, 2008. The application for leave to appeal the September 19, 2006, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 260039.

KELLY, J. (*concurring*). I concur in the Court's order denying leave to appeal in this case. The Court of Appeals correctly held that plaintiff is not entitled to a setoff against defendant's counterclaims.

Plaintiff, a contractor, sued defendant, a homeowner, for unpaid charges under a home remodeling contract. The trial court dismissed plaintiff's suit pursuant to MCL 339.2412(1) when it learned that plaintiff did not have a residential builder's license. The case proceeded to trial on defendant's counterclaims for breach of contract and violation of the Michigan Consumer Protection Act (MCPA).[1] Despite plaintiff's unlicensed status, the trial court allowed it to present to the jury a claim for a setoff against defendant's claims based on work it had performed under the contract. The jury awarded damages to defendant but set off several thousand dollars for work performed by plaintiff.

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[1] *People v Elbert,* 21 Mich App 677 (1970); *People v Rial,* 399 Mich 431, 440 (1976) (LEVIN, J. concurring); *People v Longmier*, 114 Mich App 351 (1982); *People v Banks*, 116 Mich App 446 (1982); *People v Graber,* 128 Mich App 185, 193 (1983); *People v Laurent,* 171 Mich App 503 (1988); *People v Pillar*, 233 Mich App 267, 270 (1998).

[2] The judge presided over the assault trial and stated that he would have found defendant guilty had he been on the jury. He said defendant was lucky that the police "screwed up the investigation." He was convinced that defendant was a "danger" and needed to be "slowed down."

[1] MCL 445.901 *et seq*.

The Court of Appeals reversed, holding that plaintiff was not entitled to a setoff because it was unlicensed and therefore barred from seeking compensation for work performed. We initially granted leave to appeal to determine whether asserting a claim for a setoff amounts to bringing or maintaining an action for purposes of MCL 339.2412(1).

MCL 339.2412(1) provides:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an *action* in a court of this state *for the collection of compensation* for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. [Emphasis added.]

Black's Law Dictionary (8th ed) generally defines "action" as "a civil or criminal judicial proceeding." Black's further notes that an " 'action' in the sense of a judicial proceeding includes recoupment, counterclaim, *set-off*, suit in equity, and any other proceedings in which rights are determined."[2] Here, plaintiff's claim was in fact a setoff against an amount found by the jury to be owed to defendant.[3] Specifically, the trial court's judgment provides:

> ROBERSON'S CLAIM FOR SETOFF
>
> 5. Mr. Larson asked for or received services in addition to those provided for in the construction contract and waived the contract provision requiring his written change order as to those items.
>
> 6. The dollar value of the items as to which Mr. Larson waived the writing requirement and which Roberson performed are as follows:
>
> Extras: $6,378.

By labeling something a "recoupment" rather than a setoff, an unlicensed builder may not avoid the proscription of § 2412(1). Such a maneuver, if permitted, would elevate form over substance. Furthermore,

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[2] See MCL 440.1201(1).

[3] Justice MARKMAN opines that plaintiff's claim is a "recoupment" rather than a "setoff." He relies on the definition of "setoff" in Black's Law Dictionary (6th ed). But he overlooks Black's second definition of "setoff," which includes "a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor." I believe that, in his attempt to find the proper label for plaintiff's claim, Justice MARKMAN misses the point. At issue is whether plaintiff's setoff, recoupment, counterclaim, counterdemand (call it what you may) constitutes an "action" within the meaning of § 2412(1).

in *Stokes v Millen Roofing Co*, we broadly construed the statutory term "compensation."[4] Even though the plaintiff in *Stokes* sought compensation in the form of a "setoff," it was nonetheless "compensation" or "something to be received as an equivalent for [the plaintiff's] services."[5] Accordingly, given Black's definition of "action," the precedent in *Stokes*, and the desirability of avoiding misleading labels, plaintiff's claim in this case constitutes an "action" for purposes of § 2412(1).[6]

This analysis is only the first step in applying § 2412(1). The second step is to determine whether plaintiff's setoff claim constitutes an action for the "collection of compensation." In *Stokes*, we held that because "compensation" is not a term of art, we apply a dictionary definition to it.[7] Accordingly, "compensation" means "something given or received as an equivalent for services, debt, loss, injury, etc.; indemnity; reparation; payment."[8] Applying this definition for purposes of § 2412(1), we held that the statute "disallows an action for the reasonable value of materials conveyed, because such an action seeks 'payment' or 'something given or received as an equivalent for [a] debt' or 'loss.' "[9]

When these definitions are applied to this case, plaintiff's claim is explicitly barred by § 2412(1). Plaintiff is seeking payment for work it performed on defendant's home. The trial court, pursuant to § 2412(1), dismissed plaintiff's initial suit for breach of contract because plaintiff was unlicensed. Thus, plaintiff is now essentially seeking to do indirectly what it could not accomplish directly, maintain an action against defendant for damages for breach of contract. In fact, the compensation plaintiff seeks is a dollar-for-dollar reduction in the amount owed to defendant.

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[4] *Stokes v Millen Roofing Co*, 466 Mich 660, 666 (2002).

[5] *Id*. at 665 (citation and quotation marks omitted).

[6] I agree with Justice MARKMAN that, according to Black's Law Dictionary, plaintiff's claim for a setoff may arguably be characterized as a "defense." However, both Stokes and Black's lead to the conclusion that an "action" includes a claim for a setoff. The Court of Appeals held, and this Court has agreed, that a claim such as plaintiff's constitutes an "action" as a matter of law. Any further discussion of whether an "action" encompasses setoffs, recoupments, etc. is pointless once it was determined that plaintiff's claim constituted an "action" under § 2412(1). Moreover, Justice MARKMAN's concern for the potential exposure of unlicensed builders to lawsuits is of no consequence to the resolution of this case. The Legislature clearly intended that builders who wish to use the courts to enforce their construction contracts with homeowners must obtain licensure from the state.

[7] *Stokes*, *supra* at 665.

[8] *Random House Webster's College Dictionary* (1995).

[9] *Stokes*, *supra* at 666.

The Court of Appeals properly held that plaintiff was not entitled to seek a setoff against defendant's counterclaims. Accordingly, I concur in the Court's order denying plaintiff's application for leave to appeal.

YOUNG, J. I join the statement of Justice KELLY.

MARKMAN, J. (*dissenting*). Plaintiff contractor sued defendant homeowner for unpaid charges under a contract for home remodeling. Its suit was dismissed on the basis of MCL 339.2412(1) when it was disclosed that plaintiff did not have a residential-construction license. The case then proceeded to trial on defendant's counterclaims for breach of contract and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The trial court allowed plaintiff to present a "setoff" claim as an affirmative defense based on certain work it had performed under the contract.[1] Although the jury eventually determined that defendant was entitled to $25,464 because plaintiff had breached the contract by failing to provide workmanlike services, it found that plaintiff was entitled to a "setoff" of $6,378. The jury also determined that plaintiff had not "failed to provide the promised benefit" under the contract, so the trial court awarded no MCPA damages. The Court of Appeals ruled that plaintiff was not entitled to any "setoff" because it was unlicensed, reversed on the MCPA claim, and remanded to the trial court to determine the attorney fees that should be awarded to defendant under the MCPA.

MCL 339.2412(1) provides:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not *bring or maintain* an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. [Emphasis added.]

Therefore, an unlicensed contractor cannot "bring or maintain an action . . . for the collection of compensation . . . ." See *Stokes v Millen Roofing Co*, 466 Mich 660, 667 (2002).

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[1] Although the parties and the lower courts refer to plaintiff's claim as a setoff, the claim is more accurately identified as a recoupment. A setoff is a "[r]emedy employed by defendant to discharge or reduce plaintiff's demand by an opposite one arising from a transaction which is extrinsic to plaintiff's cause of action." Black's Law Dictionary (6th ed). A recoupment is "[t]he right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very contract giving rise to plaintiff's claim." *Id*. Because, here, plaintiff's claim arises from the same contract giving rise to defendant's claim, it is one for a recoupment and not for a setoff.

The issue here is whether making a claim for a setoff or recoupment as a *defense* to another party's claim amounts to "bring[ing] or maintain[ing] an action." Black's Law Dictionary (6th ed) defines "action" as "a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law."[2] A cause of action may be asserted by a "complaint, cross-claim, counterclaim, or third-party claim . . . ." MCR 2.111(F)(2). Here, the setoff or recoupment claim was not asserted in a complaint, cross-claim, counterclaim, or third-party claim. Rather, it was asserted only as a defense in plaintiff's answer to defendant's counterclaim.

MCR 2.111(F)(2) provides that a "party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim." That is, a party must file an answer raising any *defenses* it has to an action that has been filed against it.[3] This at least suggests that a defense does not constitute an "action," but, rather, constitutes something one files to protect oneself *against* an action that has already been brought against one. Thus understood, raising a defense would not constitute "bring[ing] or maintain[ing] an action" under MCL 339.2412(1).

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[2] Justice KELLY concludes that because Black's Law Dictionary (7th ed) provides that " '[a]ction' in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined," and because plaintiff's claim was a "setoff," it is necessarily an "action" for purposes of MCL 339.2412(1). I disagree. Not only does Black's (6th ed) itself indicate that a recoupment, which, as noted above, properly describes the instant claim, is "a purely defensive matter," and not only does Black's (8th ed) itself states that a recoupment constitutes an "affirmative defense," which, as noted below, is distinct from an "action," but the language invoked by Justice KELLY quotes the Uniform Commercial Code (UCC) § 1-201(b)(1). The instant case does not involve the UCC, but, rather, the Occupational Code, which statute has a very different purpose, with particular implications in terms of what constitutes an "action." Unlike the UCC, which is designed to simplify, clarify, and make uniform the law of commercial transactions, the Occupational Code specifically prohibits unlicensed professionals from bringing an "action" in order to facilitate the code's purpose of preventing and penalizing unlicensed activity. Finally, even on its own terms, that an "action" under the UCC "includes" a recoupment and a setoff does not logically signify that a recoupment or setoff can *only* be considered an action, and not something else in a different context as well. That, for example, the term "Christmas Decorations" includes pine trees does not mean that pine trees may not also be considered coniferous trees for different purposes.

[3] An "answer" is "the formal written statement made by a [party] setting forth the grounds for [the party's] defense[.]" Black's Law Dictionary (6th ed).

This conclusion is further underscored by the definition of "defense." A "defense" is "[t]hat which is offered and alleged by the party proceeded against in an action or suit . . . to diminish plaintiff's cause of action or defeat recovery." Black's Law Dictionary (6th ed). Thus, a defense is not an action, i.e., a complaint or counterclaim, but something one files in response to a complaint or a counterclaim to shield oneself from that action. Although MCL 339.2412(1) prohibits certain persons from "bring-[ing] or maintain[ing] an action," it does not prohibit them from *defending* themselves in an action brought against them. And one of the ways by which a party may defend itself is to "diminish [an opponent's] cause of action" by way of a setoff or recoupment. Because nothing in the law precludes an unlicensed builder from raising a setoff or recoupment claim as a defense, I believe the Court of Appeals decision is in error.

The Court of Appeals decision deprives unlicensed builders of even the most basic opportunity to defend themselves in a court of law *and o*pens the door to extraordinarily unfair exercises in gamesmanship by those who might sue an unlicensed builder. For example, under the court's interpretation of MCL 339.2412(1), a landowner could knowingly hire an unlicensed contractor to build a home and contract to pay him $200,000. The builder completes the project after spending $150,000 in labor and construction materials. Relying on the Court of Appeals decision in this case, the owner may then claim that the builder failed to properly perform part of the project, refuse to pay him, and seek *additional damages* of $40,000 knowing that the builder would be wholly unable to obtain compensation for the benefits conferred by his work or even raise a setoff or recoupment defense to the additional claim. While the former result may be required under the statute, see *Stokes*, *supra* at 675-677 (2002) (MARKMAN, J., concurring), I do not believe the latter result is. I do not believe that the Legislature intended by this statute to deprive the builder in the foregoing hypothetical scenario of $190,000 ($150,000 in labor and construction materials and $40,000 in additional damages sought by the owner) without affording him even a minimal opportunity to defend himself by raising a setoff or recoupment defense. "The statute removes an unlicensed contractor's power to *sue*, not the power to defend. [MCL 339.2412] was intended to protect the public as a shield, not a sword." *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471 (1983).

CAVANAGH, J. I join the statement of Justice MARKMAN.

SCIOTTI v 36TH DISTRICT COURT, No. 134328. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of April 30, 2008. The application for leave to appeal the May 22, 2007, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals Nos. 266160 and 267887.

KELLY, J. (*concurring*). I concur in the Court's order denying defendant's application for leave to appeal. I write separately, however, to respond to Justice MARKMAN's somewhat conclusory assertions, which omit material facts that otherwise demonstrate that plaintiff has sustained his burden of proof in this case.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, a Caucasian male, began working for defendant 36th District Court in 1979 as a file clerk. He received two automatic promotions in 1983, and in the same year, received a bachelor's degree in management from Wayne State University. Defendant offered plaintiff another promotion in 1986, but plaintiff declined because it involved a pay reduction. Plaintiff alleged that from that time forward, he regularly applied for promotions but failed to receive one. In 1993, he filed a discrimination suit against defendant and was thereafter offered a promotion. According to plaintiff, since 1995, he has applied for eight supervisory positions: probation supervisor in March 1998, March 1999, and March 2002; central records supervisor in June 2002; three court services supervisor positions in 2002; and a position in jury services in July 2003. He was denied each position, leading to the instant reverse race discrimination suit filed under the Civil Rights Act[1] (CRA).

At trial, plaintiff alleged that all the individuals promoted ahead of him were African-Americans. Specifically, he presented evidence that since 1999, all 18 individuals promoted to open positions were African-Americans and that, in 24 years, there was only one white supervisor of the probation department. Additionally, he presented evidence that 13 of 14 supervisors in the civil/real estate division were African-Americans and that all 14 supervisors in the criminal/traffic department were African-Americans.

Plaintiff's claims were tried before a jury. At the close of plaintiff's proofs, defendant moved for a directed verdict, and the trial judge took the motion under advisement. While a ruling on the motion remained pending, the jury found in favor of plaintiff, determining that race was one of the motives or reasons that made a difference in the determination to not promote plaintiff or that defendant had retaliated against plaintiff. The jury awarded plaintiff $424,000, and the trial court subsequently granted plaintiff's motion for attorney fees. The trial judge denied defendant's motion for a directed verdict or judgment notwithstanding the verdict (JNOV).

Defendant appealed, challenging the substantive rulings on liability and the fee award. In an unpublished opinion per curiam, the Court of Appeals affirmed defendant's liability under the CRA, but reversed on the retaliatory discharge claim, holding that plaintiff failed to produce sufficient evidence to sustain the claim.

We initially granted leave to determine whether plaintiff produced sufficient evidence in support of his discrimination claims.

II. ANALYSIS

A. LEGAL BACKGROUND

The CRA provides, in pertinent part:

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[1] MCL 37.2201 *et seq*.

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment, because of religion, *race*, color, national origin, age, sex, height, weight, or marital status.[2]

Thus, the CRA clearly prohibits employers from discriminating on the basis of race.

In *Hazle v Ford Motor Co*,[3] this Court examined the law relative to establishing a prima facie case of discrimination under the CRA. The Court noted that, in some discrimination cases, a plaintiff is able to produce direct evidence of racial bias. In those cases, a plaintiff can prove unlawful discrimination in the same manner as a plaintiff would prove any other case.[4] In many cases, however, the Court recognized that there is no direct evidence of impermissible bias. In such cases, in order to survive a motion for summary disposition, a plaintiff must proceed through the burden-shifting framework expounded in *McDonnell Douglas Corp v Green*.[5]

Under *McDonnell Douglas*, a plaintiff must first offer a prima facie case of discrimination. Thus, a plaintiff is required to present evidence that (1) he belongs to a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.[6] If a plaintiff establishes a prima facie case of unlawful discrimination through circumstantial evidence, the burden then shifts to the defendant-employer to articulate a legitimate nondiscriminatory justification for its employment decision.[7] In order to survive a motion for summary disposition or a directed verdict, a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision.[8]

Therefore, with respect to the *McDonnell Douglas* factors, plaintiff was required to show first that he belongs to a protected class. Defendant did not contest this showing. Second, plaintiff must show that he suffered an adverse employment action. Again, defendant did not contest that the decision not to promote plaintiff constitutes an adverse employment action. Third, plaintiff must show that he was qualified for the positions in question. Fourth, he must show that the job was given to another

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[2] MCL 37.2202(1)(a) (emphasis added).

[3] *Hazle v Ford Motor Co*, 464 Mich 456 (2001).

[4] *Id*. at 462.

[5] *Id*., citing *McDonnell Douglas Corp v Green*, 411 US 792 (1973).

[6] *McDonnell Douglas*, *supra* at 802.

[7] *Id*.

[8] *Hazle*, *supra* at 466.

person under circumstances giving rise to an inference of unlawful discrimination. Consequently, the third and fourth elements of a prima facie case of discrimination are the subject of this appeal.

B. APPLICATION

On the basis of the aforementioned framework for analyzing discrimination claims, I believe that plaintiff has presented sufficient evidence for a reasonable jury to conclude that it is more likely than not that defendant's failure to promote plaintiff included an element of racial discrimination.

1. 1998/1999 Probation Supervisor Position

Plaintiff concedes that he cannot establish a prima facie case of discrimination for these positions.

2. May 2002 Probation Supervisor Position

Plaintiff alleged that he was qualified for this position because he had the requisite bachelor's degree. He also had the required two to five years of experience working as a probation officer. Plaintiff further alleged that he received higher scores in his interview than the chosen candidate. Plaintiff also offered evidence that the chosen candidate was selected before the interview process began.

3. June 2002 Central Records Supervisor Position

Plaintiff alleged that he was qualified for this position because he had the requisite bachelor's degree. He had also worked with court records throughout his lengthy tenure with defendant. Defendant even granted plaintiff an interview for the position, indicating that defendant believed plaintiff met the minimum qualifications for the position. Plaintiff further alleged that the chosen candidate received dismal performance reviews and that he failed to properly answer questions on a computer as a required part of the interview process, yet he was hired nonetheless.

4. 2002 Clerical Services II Position

Plaintiff alleged, and defendant does not contest, that plaintiff met the education and work experience requirements for the position. Defendant contends that plaintiff was unqualified because he was not a member of the Government Administrators Association (GAA). However, the chosen candidate, the only GAA member who applied, was also unqualified because she did not meet the education requirement at the time of the hiring. Accordingly, plaintiff alleged that the position should have been opened to non-GAA members, including plaintiff, as was customary when GAA members do not apply for a position.

5. 2002 Court Services II Positions

Plaintiff alleged that he met the educational and work experience requirements for the positions and was therefore qualified. The candidate chosen for one of the positions did not work for defendant before being hired and therefore did not meet the requirement that the applicant have five to eight years of experience in court room operations. She also lacked seniority with the court. The candidate chosen for the second position also lacked the minimum work experience within the court and was thus unqualified, but was selected nonetheless.

6. 2003 Jury Services Supervisor

Plaintiff concedes that he cannot establish a prima facie case of discrimination for this position.

But for the probation supervisor and jury services supervisor positions, plaintiff alleged that he was qualified for the relevant positions and that the jobs were given to other candidates under circumstances in which a reasonable juror could find gave rise to an inference of discrimination. Thus, the burden shifted to defendant to articulate a legitimate nondiscriminatory reason for its hiring decisions. Defendant did so in an attempt to rebut each of plaintiff's claims. Accordingly, the jury was left with a question of material fact on which reasonable minds could differ regarding whether discrimination was a motivating factor in defendant's decisions.

Having established a prima facie case, the question therefore becomes whether the trial court should have granted a directed verdict or JNOV to defendant. Directed verdicts and JNOVs are granted only in limited circumstances.[9] This Court reviews motions for a directed verdict or JNOV by drawing all legitimate factual inferences in the light most favorable to the nonmoving party.[10] Such motions may be granted on some or all of the issues presented if a verdict is against the great weight of the evidence.[11] A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.[12] If the evidence conflicts, the issue of credibility ordinarily should be left to the trier of fact.[13]

Here, viewing the evidence in a light most favorable to plaintiff and granting every reasonable inference to plaintiff, defendant has failed to establish a right to relief. As alleged, plaintiff set forth a prima facie case, which defendant then rebutted with claims that its hiring decisions were nondiscriminatory. This created a question of fact on which reasonable minds could differ. The jury rendered a verdict for plaintiff, and I believe the verdict must stand. A verdict should not be overturned if there is *an* interpretation of the evidence that provides a logical explanation for the jury's findings.[14] I believe that the evidence can be interpreted so as to uphold the jury's findings.[15]

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[9] See MCR 2.611(A).

[10] *Wilkinson v Lee*, 463 Mich 388, 391 (2000).

[11] MCR 2.611(A)(1)(e).

[12] *People v Musser*, 259 Mich App 215, 218-219 (2003).

[6] MCL 780.766(2).

[14] *Granger v Fruehauf Corp*, 429 Mich 1, 7 (1987).

[15] In his dissenting statement, Justice MARKMAN sets forth defendant's arguments about why its hiring decisions were nondiscriminatory. However, Justice MARKMAN ignores the fact that these arguments, used to rebut plaintiff's prima facie claim that defendant's reasons were a pretext for discrimination, merely created a question of fact on which

III. CONCLUSION

I concur in the Court's decision to deny defendant's application for leave to appeal. Plaintiff established a prima facie case of discrimination and defendant, although offering nondiscriminatory reasons for its hiring decisions, failed to persuade the jury that it did not discriminate against plaintiff. Accordingly, defendant is not entitled to relief, and the jury's verdict must stand.

YOUNG, J. (*concurring*). I concur in the Court's decision to deny the application for leave to appeal because the defendant is not entitled to the relief it seeks. The trial court did not abuse its discretion by admitting the lay opinion testimony of the defendant's former human resources administrator, and the defendant did not request any limiting instruction concerning her testimony. The defendant also acquiesced in the jury's consideration of the plaintiff's "statistical evidence."[1] Although the

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reasonable minds could differ. Because the jury, not Justice MARKMAN, was the trier of fact in this case, I believe that the jury's verdict must stand. Indeed, the facts disfavoring plaintiff's discrimination claims, which Justice MARKMAN references, merely support my position that reasonable minds could differ in interpreting the evidence presented at trial. Justice MARKMAN is free to credit the testimony of whomever he wishes. However, his role as an appellate judge precludes him from substituting his interpretation of the evidence for that of the jury.

Justice MARKMAN also asserts that the Court of Appeals erred in relying on plaintiff's "statistical" evidence. This assertion is somewhat tangential to the dispositive subject of this appeal—whether plaintiff set forth a prima facie case of discrimination. Nonetheless, plaintiff did not rely solely on "statistical" evidence in support of his claim. Rather, plaintiff introduced testimony of a coworker that defendant made hiring decisions without considering all applicants, offered evidence that he was treated poorly by defendant's human resources department, and evidence that he was more qualified than chosen candidates and was denied promotions despite these qualifications. Justice MARKMAN dismisses this evidence as "wholly irrelevant." While he may question the credibility of the evidence, the jury apparently did not. It is worth repeating that this Court's mere disagreement with the factual findings of the jury is not grounds for granting a motion for a directed verdict or JNOV. And, even if the statistical evidence were insufficient standing alone, plaintiff introduced sufficient other evidence of discrimination from which a reasonable mind could infer an element of discrimination.

[1] The plaintiff submitted evidence indicating that 13 of the 14 supervisory positions in the civil and real estate divisions were held by African-Americans, that all 14 supervisory positions in the criminal and traffic divisions were held by African-Americans, and that all 18 supervisory positions filled since 1999 were filled with African-Americans.

defendant may have had a legal basis for excluding the "statistical evidence" as incompetent to establish an inference of racial discrimination,[2] such evidence was properly before the jury in the absence of an objection by the defendant. Finally, in agreeing on a general verdict, the defendant waived any right to have the jury individually assess each contested promotional decision. Therefore, the jury did not need to specify which of the defendant's promotional decisions violated the ban on racial discrimination in MCL 37.2202(1)(a).

Given the evidence properly before it, a reasonable jury could have found that at least one of the defendant's adverse promotional decisions violated the ban on racial discrimination in MCL 37.2202(1)(a). Accordingly, I concur in this Court's decision to deny the application for leave to appeal. The courts below correctly denied the defendant's motion for a judgment notwithstanding the verdict.

TAYLOR, C.J., and CORRIGAN, J. We join the statement of Justice YOUNG.

MARKMAN, J. (*dissenting*). In this "reverse discrimination" case, the jury awarded plaintiff $424,000. The trial court denied defendant's motion for a judgment notwithstanding the verdict (JNOV), and the Court of Appeals affirmed. This Court then granted leave to appeal.

In *Lind v Battle Creek,* 470 Mich 230 (2004), we held that a reverse discrimination plaintiff must satisfy the same standards required of other discrimination plaintiffs. In *Hazle v Ford Motor Co,* 464 Mich 456, 462 (2001), we held that if there is no direct evidence of discrimination, the plaintiff may " 'present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.' " (Citation omitted; emphasis in the original.) In order to establish a prima facie case of discrimination, the plaintiff must present evidence that

> (1) [he or] she belongs to a protected class, (2) [he or] she suffered an adverse employment action, (3) [he or] she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. [*Id.* at 463.]

"[O]nce a plaintiff establishes a prima facie case of discrimination-, . . . the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason." *Id.* at 464. "If the employer makes such an articulation, the presumption created by the . . . prima facie case drops away." *Id.* at 465. "At that point, . . . the plaintiff must demonstrate that the evidence in the case,

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[2] The data that the plaintiff introduced fails to indicate the racial makeup of the applicant pool for individual supervisor positions that the defendant filled. Absent that point of comparison, the data itself has little probative value in determining whether the defendant discriminated against the plaintiff on account of his race. See *Pippin v Burlington Resources Oil & Gas Co*, 440 F3d 1186, 1197-1198 (CA 10, 2006).

when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.' " *Id*. (citation omitted). In other words, the plaintiff must demonstrate that the employer's nondiscriminatory reason was a " 'pretext for [unlawful] discrimination.' " *Id.* at 466 (citation omitted).

In the instant case, plaintiff has failed, in my judgment, to establish a prima facie case of discrimination. Even assuming that the first three elements of *Hazle* are satisfied, plaintiff has presented absolutely no evidence to establish that the positions were given to other persons "under circumstances giving rise to an inference of unlawful discrimination." *Id.* at 463. Even assuming that plaintiff had established a prima facie case of discrimination, defendant has produced "evidence that its employment actions were taken for a legitimate, nondiscriminatory reason." *Id.* at 464. In response, the plaintiff has failed to demonstrate that defendant's nondiscriminatory reasons were a mere " 'pretext for [unlawful] discrimination.' " *Id.* at 466 (citation omitted).[1]

Between 1998 and 2003, plaintiff unsuccessfully applied for eight different supervisory positions. He is Caucasian and all of the successful candidates were African-Americans.

(1) In 1998, defendant posted an opening for a Probation Supervisor. This position was not filled in 1998. Plaintiff does not argue that defendant's failure to fill this position in 1998 was the result of racial discrimination.

(2) The Probation Supervisor position was re-posted in 1999, and the position was filled by somebody who had 10 more years of experience as a probation officer. Plaintiff now concedes that he cannot prove discrimination with regards to this promotion decision.

(3) The second Probation Supervisor position was filled by a person who had three more years of experience as a probation officer, two more years of experience working for the court, had the preferred bachelor's degree in psychology, social work, or a related field, and had been the interim probation supervisor for the preceding seven months. In addition, this person appeared for her interview with a portfolio of her accomplishments and an action plan for improvements in the probation department, while plaintiff brought nothing like this to his interview. In fact, when applying for this position, plaintiff submitted a two-page resume accompanied by a letter that merely stated, "I am qualified for this position because I have 25 years of court experience."[2]

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[1] Even assuming that plaintiff is entitled to a presumption of discrimination, the Court of Appeals, contrary to the test set forth in *Hazle*, failed to even consider whether defendant rebutted this presumption.

[2] Justice KELLY's concurrence: (a) relies on the fact that plaintiff had a bachelor's degree, but ignores the fact that the person who received the promotion had the preferred bachelor's degree in "psychology, social work, counseling, or a related field"; (b) relies on the fact that plaintiff had seven years of experience working as a probation officer, but ignores

(4) The Central Records Supervisor position was filled by a person who had worked as a clerk in the records department for four years and as a senior clerk in that department for one year. Plaintiff had no experience in records. In addition, the person who was hired had made proposals for procedural changes in the records department that were later implemented by the records department, he had prepared for his interview by researching court records storage techniques used in other states and by drafting a mission statement for the records department, and he presented this information to the interview panel in what was viewed as a professional manner using a display board.[3]

(5) Plaintiff was not eligible for the Clerical Services Supervisor II position because he was not a member of the Government Administrators Association (GAA), as only supervisors are members of the GAA. Plaintiff had the opportunity to become a member of the GAA, but turned this down because it would have involved a pay reduction. Plaintiff admitted that other applicants, including African-Americans, who were not GAA members were not eligible for this promotion either.[4]

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the fact that the person who received the promotion had 10 years of experience working as a probation officer; and (c) relies on the fact that plaintiff received higher scores in his interview, but ignores the fact that this higher score was received in 1999, three years before the 2002 promotion decision, and that, in 2002, the person who received the promotion earned an interview score that was almost twice as high as plaintiff's.

[3] The concurrence: (a) relies on the fact that plaintiff had worked with court records, but ignores the fact that the person who received the promotion worked as a clerk in the records department for four years and as a senior clerk in that department for one year and that plaintiff had never worked in the records department; and (b) relies on the fact that the person who received the promotion had received negative performance reviews, but ignores the fact that these negative reviews occurred several years before the pertinent promotion decision and that in the meantime this person had proposed changes in the records department that were subsequently implemented by the department and that he was especially well prepared for his interview.

[4] The concurrence: (a) states that the person who received this promotion did not have a bachelor's degree at the time of hiring, while failing to acknowledge that defendant's human resource generalist testified that the person who received the promotion did have a bachelor's degree; (b) fails to recognize that plaintiff's only evidence that the person who received the promotion did not have a bachelor's degree in 2002 was that in 2000 she indicated that she was in her second year in college, yet does not explain why this means that she did not have her bachelor's degree in 2002; and (c) fails to acknowledge that plaintiff admits that there is no question that this person currently has a bachelor's degree.

(6) Plaintiff was also not eligible for the Jury Services Supervisor position because he was not a member of the GAA. Plaintiff now concedes that he cannot prove discrimination with regard to the Jury Services Supervisor position.

(7) The first Court Services Supervisor II position was filled by somebody who had been the Assistant to the Chief Administrative Officer for the City of Detroit, had six years of experience with defendant as the in-house counsel coordinator, and had two more years of experience working for defendant.[5]

(8) The second Court Services Supervisor II position was filled by somebody with over 20 years of management experience, a bachelor's degree, and excellent references. Plaintiff has no management experience.[6]

For the above reasons, I believe that defendant has presented a race-neutral rationale for each of its decisions. In response, plaintiff has failed to provide any evidence that these reasons were merely a pretext for discrimination.

Moreover, the Court of Appeals seriously erred in relying on plaintiff's supposed "statistical" evidence of racial discrimination. Plaintiff here has merely submitted evidence that most of defendant's supervisors are African-Americans, a not particularly surprising result in light of the racial composition of the overall 36th District Court work force and of the surrounding community served by that court. Most tellingly, plaintiff has submitted no evidence regarding how many non-African-Americans applied for any of these supervisory positions. Without knowing whether there were non-African-Americans who *applied* for a given position, the fact that an African-American *received* the position can hardly be viewed as evidence of discrimination. To view plaintiff's "statistical" evidence as relevant under these circumstances is to accept the premise that employment numbers ought to reflect certain racial proportions. I do not accept this premise in minority discrimination lawsuits, and I do not accept this in "reverse discrimination" lawsuits. Absent direct or circumstantial evidence, it is simply impossible to determine whether an employer has engaged in unlawful discrimination against either African-Americans or non-African-Americans without at least knowing how many African-Americans and how many non-African-Americans applied for a particular position. One simply cannot infer racial discrimination from the mere fact that a disproportionate number of defendant's supervisors are of one

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[5] The concurrence states that the person who received the position was "unqualified," but completely ignores the above-described qualifications of this person.

[6] The concurrence relies on the fact that the person who received the position had no experience in courtroom operations and no seniority with the court, but ignores the fact that while plaintiff had *no* management experience of any kind, the person who received the position had over 20 years of management experience.

race or another.[7]

The concurrence states that this issue is "tangential to the dispositive subject of this appeal—whether plaintiff set forth a prima facie case of discrimination." *Ante* at 1148 n 15. However, contrary to its contention, the issue here is not merely whether plaintiff set forth a prima facie case of discrimination. Although the concurrence admits that defendant presented a race-neutral rationale for each of its decisions, it fails to recognize the legal significance of this assertion. That is, it fails to recognize that once the defendant presents nondiscriminatory reasons for its decisions, "the presumption of discrimination created by plaintiff's prima facie case dropped away, and the burden of production returned to plaintiff to show the existence of evidence 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.' " *Hazle, supra* at 473 (citation omitted). The Court of Appeals concluded that plaintiff satisfied this burden because plaintiff presented evidence that he was more qualified than some of the individuals who were hired to fill the positions that he sought and because plaintiff presented "statistical" evidence to support his claim of discrimination. As discussed earlier, I do not believe that plaintiff presented evidence that he was more qualified than the individuals who secured the positions for which plaintiff applied. Therefore, whether the Court of Appeals erred in relying on plaintiff's "statistical" evidence is not "tangential to the dispositive subject of this appeal." Rather, it is central.

Because plaintiff has presented no evidence of racial discrimination, or even any evidence that one could use to infer that plaintiff was the victim of racial discrimination, I would reverse.

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[7] That defendant did not affirmatively object to the admission of this "statistical" evidence is not particularly relevant because the issue here is not whether the evidence was admissible; rather, it is whether the *Court of Appeals* erred in relying on this evidence to justify its affirmance of the trial court's denial of defendant's JNOV motion.

The concurrence states that "even if the statistical evidence were insufficient standing alone, plaintiff introduced sufficient other evidence of discrimination." *Ante* at 1148 n 15. This "other evidence" is apparently the testimony of Nancy Cook, a former coworker. However, Cook admittedly played no role in any promotion decision and her beliefs about defendant's exercises in racial discrimination were based on nothing other than her own speculations. Moreover, Cook did not work for defendant during any of the promotion decisions that are at issue here. Although she worked for defendant at the time of the first probation supervisor promotion decision, plaintiff now concedes that he is not able to establish a prima facie case of discrimination with regard to this promotion decision. For these reasons, Cook's testimony is wholly irrelevant.

PEOPLE v ZENTZ, No. 136690; Court of Appeals 285118.

CAVANAGH, J. (*concurring*). It appears from the record before us that, on resentencing, the trial court may not have complied with the order of the Court of Appeals. There was an agreement under *People v Cobbs*, 443 Mich 276 (1993), for a minimum sentence no greater than 171 months. The Court of Appeals vacated the defendant's minimum sentence of 225 months and remanded with directions to either permit the defendant to withdraw her plea or to resentence her pursuant to the agreement. The June 18, 2008, judgment of sentence indicates that, at resentencing, the court again sentenced the defendant to a 225-month minimum term. However, the instant appeal does not arise from the June 18, 2008, judgment and we do not have before us transcripts of the proceedings on remand. Because this case is not properly before us, I would decline to review it now. Any remedy in this case is properly pursued by application for leave to appeal in the Court of Appeals from the trial court's June 18, 2008, judgment of sentence.

KELLY, J. I join the statement of Justice CAVANAGH.

PEOPLE v KRAMP, No. 137002; Court of Appeals No. 278762.

OVERBAY v BOTSFORD GENERAL HOSPITAL, No. 137807; Court of Appeals No. 287941.

Summary Disposition December 23, 2008:

KING v MCPHERSON HOSPITAL, No. 137073. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 284436.

Leave to Appeal Denied December 23, 2008:

PEOPLE v CATO, No. 136425; Court of Appeals No. 266323.

PEOPLE v CRAIG GREEN, No. 136461; Court of Appeals No. 283549.

In re ESTATE OF STANOWSKI (STANOWSKI v STANOWSKI), No. 136532; Court of Appeals No. 273718.

MARKMAN, J. (*concurring*). Although I agree that a denial of leave to appeal is appropriate, the existence of what appears to be a written acknowledgment by Lillian Mamo that the value of the Judd Road property would be deducted from her share of the estate compels me to address the trial court's application of MCL 700.2608.

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, went into effect on April 1, 2000. MCL 700.8101(1). EPIC applies not only to all governing instruments executed by decedents who die after that date, but also to all proceedings currently pending in court or commenced after that date. MCL 700.8101(2)(a) and (b). Because this action was pending on April 1, 2000, EPIC was applicable and it was not error for the trial court to apply MCL 700.2608.

Under MCL 700.2608(1)(c):

> Property a testator gave in his or her lifetime to a person is treated as a satisfaction of a devise in whole or in part only if any of the following are true:
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> * * *
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> (c) the devisee acknowledges in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

Thus, in light of the written acknowledgment, it would appear that the trial court erred by concluding that the value of the Judd Road property was not to be deducted from Lillian's devise. However, this is not petitioner's argument. Instead, he argues that EPIC is not applicable. Indeed, if we were to agree with petitioner, this Court could grant him no relief. Before EPIC, MCL 700.139 governed this issue and it provided:

> Property which a testator gave in his lifetime to a devisee shall be treated as a satisfaction of the devise in whole or in part, *if the will provides for deduction of the lifetime gift.* [Emphasis added.]

The will in this case had no such provision, and an advancement could not be proven in any way other than "where the testator's will contains a provision to that effect." *In re Hall Estate*, 180 Mich App 389, 393 (1989). Under this precedent, Lillian's written acknowledgment is of no moment and the result would remain the same. Moreover, even though EPIC is applicable, the trial court was permitted to apply the prior law "in the interest of justice." MCL 700.8101(2)(b). Where a determination that the Judd Road property was an advancement would not only completely disinherit Lillian, but result in her having to make a significant repayment to her mother's estate, I do not believe that the trial court abused its discretion by concluding that such an application was clearly "in the interests of justice." Therefore, I believe that the trial court's misapplication of MCL 700.2608 was harmless and accordingly concur in the decision to deny leave to appeal.

PEOPLE v LEONARD TURNER, No. 136614. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282050.

MOREFIELD v GRAND TRUNK WESTERN RAILROAD, INC, No. 136735; Court of Appeals No. 275767.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

OLIVER/HATCHER CONSTRUCTION AND DEVELOPMENT, INC v SHAIN PARK ASSOCIATES, No. 136803; Court of Appeals No. 275500.

STEARNS v PRO-TECH ENVIRONMENTAL & CONSTRUCTION SERVICES, INC, No. 137004; Court of Appeals No. 270315.

JONES v WINKLER, No. 137014; Court of Appeals No. 278276.

KING v MCPHERSON HOSPITAL, No. 137071; Court of Appeals No. 283271.

SCHILS v DEPARTMENT OF LABOR & ECONOMIC GROWTH, Nos. 137093 and 137094. Costs of $375 are assessed against the plaintiff in favor of the defendant under MCR 7.316(D)(1) for filing a vexatious appeal. The plaintiff, Michael Schils, is barred from submitting additional filings in this Court in non-criminal matters until he offers proof that he has paid all outstanding court-imposed sanctions. Court of Appeals Nos. 272650 and 273804.

CITY OF ROCKFORD v 63RD DISTRICT COURT, No. 137458; Court of Appeals No. 287501.

Reconsiderations Denied December 23, 2008:

TACCO FALCON POINT, INC v CLAPPER, No. 133430. Leave to appeal denied at 481 Mich 886. Court of Appeals No. 271525.

CAVANAGH and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would remand this case to the trial court for the reasons stated in the Court of Appeals dissenting opinion.

KELLY, J. I would grant reconsideration.

PEOPLE v CHAMBERS, No. 135736. Leave to appeal denied at 482 Mich 980. Court of Appeals No. 277828.

PEOPLE v KORAS, No. 136026. Leave to appeal denied at 482 Mich 972. Court of Appeals No. 282578.

PEOPLE v COLLINS, No. 136123. Leave to appeal denied at 482 Mich 1006. Court of Appeals No. 279645.

KELLY, J. I would grant reconsideration.

SMILEY v GROSSE POINTE WAR MEMORIAL ASSOCIATION, No. 136172. Leave to appeal denied at 482 Mich 916. Court of Appeals No. 275937.

PEOPLE v SCOTT, No. 136481. Leave to appeal denied at 482 Mich 989. Court of Appeals No. 279874.

JACOBSON v NORFOLK DEVELOPMENT CORPORATION, Nos. 136586 and 136588. Leave to appeal denied at 482 Mich 976. Court of Appeals Nos. 281587 and 283361.

PEOPLE v KIRCHER, No. 137426. Leave to appeal denied at 482 Mich 1044. Court of Appeals No. 287977.

Summary Dispositions December 29, 2008:

PEOPLE v SHAHIDEH, No. 135495. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties

having been considered by the Court, we reverse the October 25, 2007, judgment of the Court of Appeals because the defendant waived his right to appellate relief by abandoning his insanity defense. The defendant sought a court order permitting a privately retained psychologist to examine him while he was in jail for the purpose of evaluating the merits of an insanity defense. The trial court denied the defendant's motion, holding that the defendant must first file a notice of intent to assert an insanity defense pursuant to MCL 768.20a(1) before he could obtain an evaluation by his privately retained expert. The Court of Appeals reversed, holding that MCL 768.20a did not apply because "only a defendant who 'plan[s]' or 'intends' to raise the insanity defense at trial must comply with the procedures set forth in MCL 768.20a." *People v Shahideh*, 277 Mich App 111, 116 (2007), quoting *Random House Webster's College Dictionary* (1997) for the definition of "propose."

The trial court's ruling did not prohibit the defendant from pursuing an insanity defense. The defendant was fully aware that he could file a § 20a(1) notice and continue pursuing an insanity defense. Defense counsel gathered sufficient information through his investigation to form a good-faith basis for filing a notice of intent under MCL 768.20a(1). Instead, the defendant elected to abandon an insanity defense in favor of a mitigation defense. " '[W]aiver is the "intentional relinquishment or abandonment of a known right." ' " *People v Carines*, 460 Mich 750, 762 n 7, quoting *United States v Olano*, 507 US 725, 733 (1993). " 'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.' " *People v Carter*, 462 Mich 206, 215 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Thus, regardless of whether the trial court erred in holding that MCL 768.20a applied, the defendant abandoned the insanity defense and cannot obtain appellate relief because his chosen defense strategy failed. "Counsel may not harbor error as an appellate parachute." *Carter*, *supra* at 214. Accordingly, we reinstate the defendant's conviction. Reported below: 277 Mich App 111.

TAYLOR, C.J. (*concurring*). I have signed the order reversing the Court of Appeals opinion and ruling that defendant waived the issue whether any error occurred. I write separately because the Court of Appeals opinion is published and I wish to explain why I conclude that the Court of Appeals analysis of several issues is erroneous.

The substantive issue in this case is whether an incarcerated defendant has a right to a court order requiring a county sheriff to allow a privately retained psychologist to evaluate the defendant well beyond normal jail visitation hours so defense counsel can decide whether to file a notice of intent under MCL 768.20a to present evidence that the defendant was insane when the crime was committed. The trial court denied defendant's motion for such an order, ruling that under the statute defendant would be entitled to an independent evaluation only after an examination by the Center for Forensic Psychiatry. The Court of Appeals, however, held that the statute did not apply to defense counsel's request. It further concluded that the trial court's denial of the request violated defendant's constitutional right to the effective assistance of counsel.

I disagree with the Court of Appeals and would hold that an incarcerated defendant is not entitled to a court order requiring the sheriff to make the defendant available in the jail for a period beyond that allowed by existing jail visitation policies so that the defendant may be evaluated by a psychologist in order to help defense counsel decide whether a notice of intent under MCL 768.20a should be filed. An incarcerated defendant has no right to an independent evaluation under MCL 768.20a until a notice of intent has been filed, and then only after the defendant is first examined at the forensic center. I also would hold that the denial of defendant's motion did not violate defendant's constitutional right to the effective assistance of counsel.

I. FACTS AND PROCEEDINGS BELOW

Defendant was charged with first-degree murder, MCL 750.316(1), after he confessed to killing his girlfriend, who was found bludgeoned and stabbed to death. He was held without bond pending trial. While awaiting trial, his privately retained attorney moved for a court order to permit a privately retained psychologist to evaluate defendant in the jail to determine whether it would be appropriate to pursue an insanity defense at trial. Defense counsel explained that a court order was necessary because such an evaluation would take more time than is allowed for visits at the jail.

The prosecutor's office opposed the motion but offered to stipulate to a referral to the forensic center for an insanity examination pursuant to MCL 768.20a. Defense counsel responded that, although defendant had been diagnosed as suffering from bipolar disorder, and had previously been prescribed Prozac, Xanax, and Ritalin, he did not have a basis for filing a notice of insanity defense. Rather, he only had enough information to further investigate a possible insanity defense.

The trial court denied defendant's motion, ruling that MCL 768.20a was applicable and that defendant could only obtain an independent psychiatric evaluation after filing the statutory notice of intent, and after he had been examined at the forensic center. Defense counsel did not file an interlocutory appeal. The case proceeded to trial with the prosecution contending that the killing had been premeditated and with defense counsel arguing that defendant's actions had been impulsive, not premeditated. Defense counsel specifically told the jury that defendant was "not claiming temporary insanity."

During its deliberations, the jury sent a message to the court asking whether defendant would have been able to propose a defense of temporary insanity. The trial court advised the jury to base its decision on the evidence that had been introduced during the trial and on the law as instructed. Thereafter, the jury found defendant guilty of first-degree murder.

Defendant appealed in the Court of Appeals, raising only one issue: whether the trial court's denial of his motion to permit a psychologist to

have access to him in the jail for an independent psychological evaluation denied defendant his statutory[1] and constitutional rights.

The Court of Appeals majority concluded that the trial court had erred and remanded the case for further proceedings.[2] In particular, the Court of Appeals held that MCL 768.20a did not apply because a mere request to investigate and examine the viability or feasibility of a potential insanity defense is not sufficient to trigger the statute. The panel also held that the trial court's denial of defendant's motion had violated defendant's constitutional right to the effective assistance of counsel because it had deprived defense counsel of the opportunity to investigate a potential insanity defense.

The dissenting judge, however, agreed with the trial court that MCL 768.20a did apply and that defendant had no right to an independent psychological evaluation before giving notice of an insanity defense and being examined at the forensic center. The dissenter further indicated that, even if the statute did not control, defendant was not deprived of the right to pursue a defense or to have his own expert evaluate his mental condition. This was because defendant's right to pursue an insanity defense would have been satisfied, and he could have obtained an independent evaluation, if he had merely filed a notice of intent pursuant to MCL 768.20a.

The prosecution filed an application for leave to appeal in this Court. We granted leave to appeal and asked the parties to brief

> (a) whether MCL 768.20a governs a request by an incarcerated defendant for an independent psychiatric evaluation to determine whether an insanity defense may be available where no notice of intention to assert an insanity defense has been filed; (b) if the statute governs, whether the subsections of MCL 768.20a are to be construed seriatim, such that an independent psychiatric evaluation may not be requested under subsection 3 without first complying with subsections 1 and 2; and, (c) if the statute does not apply, whether the defendant's constitutional rights were violated by the trial court's decision to deny access to the defendant for an independent psychiatric evaluation while he was in jail.[3]

II. STANDARD OF REVIEW

Whether MCL 768.20a applied is a question of statutory interpretation. We review de novo questions of statutory interpretation. *People v Davis*, 468 Mich 77, 79 (2003). Similarly, we review de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579 (2002).

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[1] On appeal in this Court, defendant has dropped any argument that he had a statutory right to an independent evaluation.

[2] *People v Shahideh*, 277 Mich App 111 (2007).

[3] *People v Shahideh*, 480 Mich 1195 (2008).

III. PRINCIPLES OF STATUTORY CONSTRUCTION

When interpreting a statute, the Court's primary goal is to give effect to the intent of the Legislature. *Brown v Detroit Mayor*, 478 Mich 589, 593 (2007). The first step is to review the language of the statute. *Id.* If the statute is unambiguous on its face, we presume that the Legislature intended the meaning expressed, and judicial construction is neither required nor permissible. *Id.* It is also the case that "when construing a statute, a court must read it as a whole." *Apsey v Mem Hosp*, 477 Mich 120, 130 (2007). Specifically, to discover legislative intent, "the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183 (1922). See also *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159 (2001) (provisions must be read in the context of the entire statute so as to produce a harmonious whole). Likewise, subsections of a statute are not to be read discretely, but as part of a whole. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 167-168 (2004).

An undefined statutory term or phrase must be accorded its plain and ordinary meaning. MCL 8.3a;[4] *People v Thompson*, 477 Mich 146, 151 (2007).[5] A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning. *Id.* at 151-152.

IV. THE INSANITY DEFENSE

A. HISTORICAL BACKGROUND

Before 1975, the test for determining legal insanity in Michigan was controlled by *People v Durfee*, 62 Mich 487 (1886). As was explained in *People v Martin*, 386 Mich 407, 418 (1971), the "salient elements" of the *Durfee* test were: "1) whether defendant knew what he was doing was right or wrong; and 2) if he did, did he have the power, the will power, to resist doing the wrongful act?" If a defendant was found not guilty by reason of insanity, by statute, he or she was automatically committed for

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[4] MCL 8.3a provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

[5] See also MCL 750.2, which provides in part that the provisions of the Michigan Penal Code "shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

an indeterminate period to the Department of Mental Health for treatment in an appropriate state hospital. *People v McQuillan*, 392 Mich 511, 518 n 1, 519 (1974).

However, in 1974 this Court found the automatic-commitment statute unconstitutional. The *McQuillan* Court ordered that all previously committed "not guilty by reason of insanity defendants" were to be evaluated and released if they did not qualify for civil commitment. Thereafter, approximately 150 of the 270 persons[6] who had been committed after having been found not guilty by reason of insanity, whom professionals had determined to be presently sane under *McQuillan*, "were released from institutions, with tragic results. Two of the released persons soon committed violent crimes."[7]

Also, in 1974, a report was issued suggesting that the insanity verdict had been misused in many cases. As the Court explained:

> A study by the Center for Forensic Psychiatry in September of 1974 indicated that of some 350 persons found not guilty by reason of insanity only twenty percent of them suffered from mental illness sufficient to exculpate their actions. Thirty percent of those persons were found to have no mental illness whatsoever. The remaining fifty percent were viewed as having some psychosis or neurosis, but with no evident relationship between their mental state and their crime. Robey, [*Guilty but mentally ill*, 6 Bull Am Acad Psychiatry Law, 374, 374-375 (1978)]. Of course, a verdict of not guilty by reason of insanity determines a defendant's mental state at the time of the crime, not afterwards. Still, in view of these statistics and the number of persons released after *McQuillan*, and unless treatment of the mentally ill has progressed far beyond the level of which we are aware, one can hardly conclude that the Legislature was irrational in finding the insanity verdict to have been misused. [*People v Ramsey,* 422 Mich 500, 512 n 3; 375 NW2d 297 (1985).]

In response to the public outcry and perceived problems with the insanity defense, the Legislature enacted sweeping revisions to the Mental Health Code and the Code of Criminal Procedure. 1975 PA 179, 180. In particular, the Legislature:

(1) adopted a statutory definition of insanity based on § 4.01 of the Model Penal Code,

(2) created the guilty but mentally ill verdict,

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[6] Smith & Hall, Project, *Evaluating Michigan's guilty but mentally ill verdict: An empirical study*, 16 U Mich J L Ref 77, 82 (1982); Schwartz, *Moving Backward Confidently*, 54 Mich Bar J 847, 848 (1975).

[7] *People v Ramsey*, 422 Mich 500, 511 (1985).

(3) required the guilty but mentally ill verdict to be an option every time the insanity defense was raised,[8]

(4) enacted a statute preventing an individual from claiming insanity because he or she was under the influence of voluntarily consumed alcohol or drugs at the time of the alleged offense, MCL 768.21a,[9]

(5) enacted a statute requiring that the jury be instructed regarding the law before trial starts whenever an insanity defense is presented, MCL 768.29a(1),[10] and

(6) required that a defendant who wishes to pursue an insanity defense serve written notice on the court and the prosecutor not less than 30 days before trial and submit to a court-ordered examination, relating to the claim of insanity, by personnel for the Center for Forensic Psychiatry or other qualified personnel. MCL 768.20a.

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[8] Pursuant to MCL 768.29a(2), if a defendant asserts an insanity defense at trial, the jury shall be instructed regarding the following possible verdicts: "guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty with regard to the offense or offenses charged." Similarly, MCL 768.36 provides that if the defendant asserts a defense of insanity in compliance with MCL 768.20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds the defendant is guilty of an offense beyond a reasonable doubt, that the defendant has shown by a preponderance of evidence that he or she was mentally ill at the time of the commission of that offense, but that the defendant has not shown by a preponderance of the evidence that he or she was legally insane at the time of the commission of that offense.

[9] MCL 768.21a(2) currently provides:

> An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.

Before 1994, MCL 768.21a(2) provided, "A person who is under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his alleged offense shall not thereby be deemed to have been legally insane."

[10] This statute directs our courts to instruct on the definitions of mental illness, mental retardation, and legal insanity immediately before the commencement of testimony on insanity in a jury trial. See CJI2d 7.9.

Given the vastness of these legislative substantive and procedural changes, one can see why *People v Carpenter*, 464 Mich 223, 237 (2001), concluded that the Legislature had established a "comprehensive statutory framework" that determines "when mental incapacity can serve as a basis for relieving one from criminal responsibility."

B. THE CURRENT LAW REGARDING INSANITY

In 1994, the Legislature slightly revised the definition of legal insanity and further provided that a defendant has the burden of proving insanity by a preponderance of the evidence. MCL 768.21a(1) and (3).[11] Legal insanity is now a statutorily granted affirmative defense[12] requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).[13] And, as previously mentioned, pursuant to

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[11] 1994 PA 56. In addition to placing the burden of proof on the defense, the 1994 amendment also clarified that the cognitive prong of the insanity definition also includes a defendant who "lacks substantial capacity . . . to appreciate the nature and quality . . . of his or her conduct."

Before October 1, 1994, a defendant in a criminal proceeding was presumed sane, but once any evidence of insanity was introduced, the prosecution bore the burden of establishing defendant's sanity beyond a reasonable doubt. *In re Certified Question (Duffy v Foltz)*, 425 Mich 457 (1986); *People v Stephan*, 241 Mich App 482, 488-489 (2000).

[12] As we stated in *People v Hayes*, 421 Mich 271, 279 (1984), there is no constitutional right to assert an insanity defense. In fact, a few states have eliminated the insanity defense altogether. See Idaho Code Ann 18-207(1); Mont Code Ann 46-14-102; Kan Stat Ann 22-3220; Utah Code Ann 76-2-305.

[13] As explained in *People v Goad*, 421 Mich 20; (1984), jurors are not to be instructed regarding the disposition of a defendant found not guilty by reason of insanity. This is because disposition involves contingencies so numerous that disposition simply cannot be predicted. *Id*. at 32. See also MCR 6.304(B).

Persons acquitted of an offense by reason of insanity may be confined and required to undergo evaluation and treatment. MCL 330.2050. As stated in *People v Webb*, 458 Mich 265, 281 (1998), MCL 330.2050 is

MCL 768.29a(2) and MCL 768.36, if a defendant asserts an insanity defense at trial, the jury must also be instructed regarding the guilty but mentally ill verdict.[14]

There are several procedural requirements that must be satisfied before a defendant can raise an insanity defense.[15] We recently summarized those requirements in *People v Toma*, 462 Mich 281, 292 n 6 (2000):

> A defendant in a felony case who wishes to interpose an insanity defense, must serve written notice on the court and the prosecutor not less than thirty days before trial and submit to a court-ordered examination, relating to the claim of insanity, by personnel for the center for forensic psychiatry or other qualified personnel. MCL 768.20a(1) and (2); MSA 28.1043(1)(1) and (2). A defendant or the prosecutor may also obtain independent psychiatric examinations. MCL 768.20a(3); MSA 28.1043(1)(3). The failure by the defendant to fully cooperate in either the court-directed or independent examinations, bars the defendant from presenting testimony relating to insanity at trial. MCL 768.20a(4); MSA 28.1043(1)(4).

As this Court noted in *People v Hayes*, 421 Mich 271, 288 (1984), "the Center for Forensic Psychiatry is an independent branch of the state government." According to the Michigan Department of Community Health's website, the Center for Forensic Psychiatry is a 210-bed psychi-

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> a measure to promote public safety. Persons acquitted by reason of insanity, particularly where the facts are grave, cannot be allowed simply to walk out the front door of the courthouse. The statute is clearly designed to establish a procedure by which it can be determined whether the person can safely reenter society.

[14] In *Ramsey*, 422 Mich at 514, this Court rejected the claim that the "guilty but mentally ill" statute, MCL 768.36, denied a defendant a right to a fair trial by creating an unjustified risk of a compromise verdict.

[15] It is well established that the right to assert a defense may be limited by "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v Mississippi*, 410 US 284, 302 (1973). This Court has previously held that limitations placed on raising the insanity defense, pursuant to the procedures established in MCL 768.20a, do "not unconstitutionally infringe on a defendant's right to present a defense." *Hayes*, 421 Mich at 283.

atric facility located in Ann Arbor[16] "that provides both diagnostic services to the criminal justice system and psychiatric treatment for criminal defendants adjudicated incompetent to stand trial and/or acquitted by reason of insanity."[17] The forensic center performs approximately 3,100 diagnostic evaluations each year to determine defendants' competency to stand trial[18] and insanity at the times they allegedly committed their crime. *Id.*

V. THE STATUTE

MCL 768.20a provides in full:

> (1) If a defendant in a felony case proposes to offer in his or her defense testimony to establish his or her insanity at the time of an alleged offense, the defendant shall file and serve upon the court and the prosecuting attorney a notice in writing of his or her intention to assert the defense of insanity not less than 30 days before the date set for the trial of the case, or at such other time as the court directs.
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> (2) Upon receipt of a notice of an intention to assert the defense of insanity, a court shall order the defendant to undergo an examination relating to his or her claim of insanity by personnel of the center for forensic psychiatry or by other qualified personnel, as applicable, for a period not to exceed 60 days from the date of the order. When the defendant is to be held in jail pending trial, the center or the other qualified personnel may perform the examination in the jail, or may notify the sheriff to transport the defendant to the center or facility used by the qualified personnel for the examination, and the sheriff shall return the defendant to the jail upon completion of the examination. When the defendant is at liberty pending trial, on bail or otherwise, the defendant shall make himself or herself available for the examination at the place and time established by the center or the other qualified person-

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[16] The center's evaluation unit maintains satellite facilities at the Kent County Correctional Facility, Marquette County Sheriff's Department, and the Grand Traverse County Sheriff's Department for evaluation of defendants from those areas.

[17] <http://www.michigan.gov/mdch/1,1607,7-132-2941_4868_4896-14465--,00.html> (accessed December 1, 2008).

[18] Pursuant to MCL 330.2020(1), a defendant "shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." Pursuant to MCL 330.2022(1), "[a] defendant who is determined incompetent to stand trial shall not be proceeded against while he is incompetent."

nel. If the defendant, after being notified of the place and time of the examination, fails to make himself or herself available for the examination, the court may, without a hearing, order his or her commitment to the center.

(3) The defendant may, at his or her own expense, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. If the defendant is indigent, the court may, upon showing of good cause, order that the county pay for an independent psychiatric evaluation. The defendant shall notify the prosecuting attorney at least 5 days before the day scheduled for the independent evaluation that he or she intends to secure such an evaluation. The prosecuting attorney may similarly obtain independent psychiatric evaluation. A clinician secured by an indigent defendant is entitled to receive a reasonable fee as approved by the court.

(4) The defendant shall fully cooperate in his or her examination by personnel of the center for forensic psychiatry or by other qualified personnel, and by any other independent examiners for the defense and prosecution. If he or she fails to cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant shall be barred from presenting testimony relating to his or her insanity at the trial of the case.

(5) Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense.

(6) Upon conclusion of the examination, the center for forensic psychiatry or the other qualified personnel, and any independent examiner, shall prepare a written report and shall submit the report to the prosecuting attorney and defense counsel. The report shall contain:

(a) The clinical findings of the center, the qualified personnel, or any independent examiner.

(b) The facts, in reasonable detail, upon which the findings were based.

(c) The opinion of the center or qualified personnel, and the independent examiner on the issue of the defendant's insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed.

(7) Within 10 days after the receipt of the report from the center for forensic psychiatry or from the qualified personnel, or within 10 days after the receipt of the report of an independent examiner secured by the prosecution, whichever occurs later, but not later than 5 days before the trial of the case, or at another time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal of the defense of insanity which shall contain the names of the witnesses whom the prosecuting attorney proposes to call in rebuttal.

(8) The report of the center for forensic psychiatry, the qualified personnel, or any independent examiner may be admissible in evidence upon the stipulation of the prosecution and defense.

(9) As used in this section, "qualified personnel" means personnel meeting standards determined by the department of community health under rules promulgated pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

As stated in *People v Wallace*, 160 Mich App 1, 5 (1987), "[t]he purpose of requiring notice of intent to claim the defense of insanity is to protect the public and avoid unfair surprise to the prosecution at trial. The statute is also designed to protect the integrity of the evidence regarding an insanity defense." (Citations omitted.)

As is apparent, MCL 768.20a has nine subsections. Pursuant to subsection 1, a defendant who proposes to offer testimony to establish insanity is required to file and serve a notice to that effect. Subsection 2 provides that on receipt of such a notice, a trial court shall order the defendant's examination by the Center for Forensic Psychiatry. Pursuant to subsection 3, a defendant and the prosecutor are allowed to secure an independent psychiatric evaluation. Subsection 4 states that the defendant is required to "fully cooperate," and if a court is persuaded that the defendant is not cooperating, the defendant can be barred from presenting an insanity defense.[19] Pursuant to subsection 5, statements made by the defendant during an examination are not admissible at trial on any issue other than mental illness or insanity. Subsection 6 provides that examiners are required to prepare written reports of their clinical findings, including the reasonably detailed facts on which the findings are based and an opinion on whether the defendant was in fact insane, mentally ill, or mentally retarded at the time of the alleged crime. Pursuant to subsection 7, the prosecutor has to file and serve a notice of rebuttal of the insanity defense, within certain time limits, which notice shall contain the names of witnesses the prosecutor intends to call in rebuttal. Subsection 8 provides that an examiner's report may be

[19] In *People v Hayes*, 421 Mich at 275, 288, this Court held that the preclusion sanction of subsection 4 did not unconstitutionally infringe a defendant's right to present a defense and that the statute was not unconstitutionally vague.

admitted into evidence upon stipulation of the parties. Finally, subsection 9 defines the phrase "qualified personnel" as used in the statute.

VI. DID THE STATUTE APPLY?

As previously indicated, defense counsel sought a court order that would have required the county sheriff to make defendant available to a psychologist for several hours beyond what normal jail visitation policies allowed in order to assist counsel in deciding whether to assert an insanity defense. The trial court held that the statute applied such that defendant was not entitled to an independent evaluation until he had filed a notice of intent and had been examined at the forensic center. The Court of Appeals, however, determined that the statute simply did not apply because defense counsel had not proposed an insanity defense. Rather, he was only investigating whether to file a notice of intent.

MCL 768.20a(1) provides in pertinent part:

> If a defendant in a felony case proposes to offer in his or her defense testimony to establish his or her insanity at the time of an alleged offense, the defendant shall file and serve upon the court and the prosecuting attorney a notice in writing of his or her intention . . . .

The Court of Appeals analyzed the issue as follows:

> According to the plain statutory language, MCL 768.20a comes into play "[i]f a defendant in a felony case *proposes to offer* in his or her defense testimony to establish his or her insanity at the time of an alleged offense . . . ." MCL 768.20a(1) (emphasis added). Of particular relevance in this context, the word "propose" is defined as "to plan; intend," Random House Webster's College Dictionary (1997) . . . . [Emphasis in original.]
>
> * * *
>
> We cannot conclude that by requesting an independent psychological evaluation for defendant, defense counsel was "propos[ing] to offer . . . testimony to establish [defendant's] insanity at the time of an alleged offense . . . ." MCL 768.20a(1). As noted, it was not yet known whether an insanity defense would even be viable, and it would be unreasonable to deduce from counsel's mere request to investigate defendant's mental state that the defense had *solidified* "a plan or intention" to raise the insanity defense at trial. [Emphasis added.]
>
> * * *

> MCL 768.20a does not come into play until a defendant *definitively* "proposes to offer in his or her defense testimony to establish his or her insanity . . . ." [*Shahideh*, 277 Mich App at 115-117 (emphasis added).]

Thus, the Court of Appeals majority looked to *Random House Webster's College Dictionary*'s definition of the word "propose." That definition provides seven different entries. But the Court of Appeals only cited the fifth entry, which is "to plan; intend." The panel did not cite the first definition, "to offer for consideration, acceptance, or action," the third definition, "to suggest," or the seventh entry, "to form or consider a purpose or design."

The Court of Appeals also cited the *Webster's Third New International Dictionary, Unabridged Edition*'s first definition of the intransitive verb "propose," which is "to form or declare a plan or intention." But the Court of Appeals did not cite the third entry for the transitive verb form: "to offer for consideration, discussion, acceptance, or adoption."

As is apparent, the Court of Appeals cited the most narrow definitions and omitted other broader definitions of the word "propose." In *Feyz v Mercy Mem Hosp*, 475 Mich 663, 684 n 62 (2006), this Court noted that "because a word can have many different meanings depending on the context in which it is used, and because dictionaries frequently contain multiple definitions of a given word, . . . it is important to determine the most pertinent definition of a word in light of its context."

The broader definition of "to suggest or consider" (combining the third and seventh definitions from *Random House Webster's College Dictionary*) is inconsistent with the Court of Appeals majority's analysis that a notice of intent must be filed only after a defendant has "solidified" a plan or "definitively" intends to offer the insanity defense. Thus, the question is whether the most pertinent definition of "propose" in MCL 768.20a is the broad "to suggest or consider" or the more narrow "plan or intend" used by the Court of Appeals.

As explained below, there are several reasons, textual and otherwise, that the most pertinent definition of "propose" in MCL 768.20a is the broad "to suggest or consider." First, the "to suggest or consider" interpretation is supported by the broader context of the statute. Subsections 4 through 8 contain identical reporting requirements and evidentiary restrictions, regardless of whether an examination is authorized under MCL 768.20a(2) (examination at the forensic center) or (3) (independent evaluation by a clinician of defendant's choice), as is apparent from the repeated references to both the forensic center and the independent examiner in each of those sections. The Legislature had no reason to specifically permit independent evaluations and then subject them to the requirements of subsection 4 (defendant must cooperate), 5 (statements made not admissible regarding any issue other than mental illness or insanity), 6 (written report must be filed by examiner), 7 (prosecutor may file notice of rebuttal of the insanity defense), or 8 (reports filed under subsection 6 may be admitted into evidence upon stipulation of the parties) if it had intended them to be available for

investigatory purposes without the requirements of subsections 4 through 8 before the filing of a notice of intent.

Second, the broader definition of "propose" is more consistent with one of the primary purposes of the statute: "to protect the integrity of the evidence regarding an insanity defense." *Wallace,* 160 Mich App at 5. In this context, the language must mean to do everything possible to preclude the introduction of "gamed" insanity evidence or "prepping" a defendant for a forensic center examination.[20]

Under the broad definition of "propose," the statute becomes applicable once defense counsel considers whether the accused might have been insane when the crime was committed. This in turn leads to the filing of a notice of intent and a criminal responsibility examination by the forensic center. Having the first mental health examination performed by a neutral expert who is not beholden to the prosecution or the defense, before the defendant has perhaps been instructed on how to work the system, protects the integrity of the evidence regarding insanity. It prevents any taint that might occur if an independent examiner employed by the defense wittingly or unwittingly suggests how a defendant should tell his or her story or describe his or her mental health symptoms to a subsequent evaluator. See, e.g., *McGarty v O'Brien,* 188 F2d 151, 155-156 (CA 1, 1951).[21]

Previous decisions of this Court support the idea that all evaluations should come within the purview of MCL 768.20a. In *Carpenter*, 464 Mich at 231, this Court reiterated that there are "procedural requirements

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[20] Rare is the Michigan lawyer who is unaware of the "lecture" scene from *Anatomy of a Murder* (1958), by the late Justice JOHN VOELKER of the Michigan Supreme Court (using the pseudonym Robert Traver). In that novel, Lieutenant Manion shoots Barney Quill in front of a roomful of witnesses. Manion then meets his new defense attorney, and Manion blurts out a story making it plain that he committed first-degree murder. The attorney quickly stops Manion, and gives him a highly suggestive "lecture" on the defenses for murder, strongly implying that Manion's only option is an insanity defense. When the lecture ends, Manion says, "Maybe . . . maybe I was insane." He manufactures a story about blackouts and irresistible impulses, and his attorney replies, "Maybe you've got something there." Traver, *Anatomy of a Murder* (New York: St. Martin's Press, 1958), pp 44-49.

[21] Dr. Barbara Kirwin has coined the phrase "designer defense" to describe a psychological defense used in an insanity plea that is carefully fabricated to fit all the pertinent facts of the case, and then tailored to individual characteristics of the defendant that might appeal to a jury—all regardless of whether any bona fide incapacitating mental illness exists. The nature of a particular designer defense is determined by what sympathy-evoking excuses are in vogue at the time of the trial. Barbara R. Kirwin, *The Mad, the Bad, and the Innocent: The Criminal Mind on Trial* (New York: Little, Brown & Company, 1997), pp 65-95.

that must be satisfied before an insanity defense may be raised." *Id*. Particularly compelling is the description of these requirements:

> A defendant in a felony case who wishes to interpose an insanity defense[] must serve written notice on the court and the prosecutor not less than thirty days before trial and submit to a court-ordered examination, relating to the claim of insanity, by personnel for the center for forensic psychiatry or other qualified personnel. MCL 768.20a(1) and (2); MSA 28.1043(1)(1) and (2). A defendant or the prosecutor *may also obtain* independent psychiatric examinations. MCL 768.20a(3); MSA 28.1043(1)(3). [*Toma*, 462 Mich at 292 n 6 (emphasis added).]

The language "may also obtain" from *Toma* suggests that the independent evaluation permitted by MCL 768.20a(3) is in addition to, rather than an investigatory prelude to, the forensic center examination required by MCL 768.20a(2).

I also note that the Court of Appeals conclusion that the statute does not apply until defense counsel has "solidified" a plan or "definitively" intends to raise the insanity defense is contrary to how our criminal justice system actually operates. As previously mentioned, the forensic center evaluates about 3,000 defendants a year for competency and criminal responsibility (i.e., insanity). Yet, the vast majority of examined defendants do not ultimately introduce the insanity defense.[22] Many, if not most, defendants who file a notice of intent pursuant to MCL 768.20a decide not to pursue an insanity defense. Indeed, I question how defense counsel could ever "solidify" or "definitively" plan on raising an insanity defense in the absence of an expert opinion, after an examination, that the defendant was insane at the time the crime was committed.[23] Defense attorneys simply do not "solidify" their plan or "definitively" decide whether to pursue an insanity defense on their client's behalf until after an expert provides an opinion that the defendant may have been insane at the time the crime was committed.

I thus conclude that the statutory term "propose" includes "suggest or consider" and, therefore, comes into play by the time a defense attorney decides to have a psychologist or psychiatrist examine his or her client. I am satisfied that this construction is consistent with the fair import of the terms, promotes justice, and effects the objects of the law. MCL 750.2.

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[22] As is stated in the use note of CJI2d 7.9, "[f]iling a notice of intent to assert an insanity defense is not the same as actually asserting the defense at trial." (Emphasis in original.) See, e.g., *People v Toma*, 462 Mich at 290 (defendant was interviewed by a clinical psychologist pursuant to a notice of intent, but thereafter "defendant did not raise insanity as a defense at trial").

[23] This is not surprising given that the defendant has the burden of proof with respect to an insanity defense.

VII. IS A NOTICE OF INTENT TO ASSERT AN INSANITY DEFENSE A PARTY ADMISSION?

In an attempt to bolster its conclusion that the statute did not apply to defense counsel's motion, the Court of Appeals noted that MRPC 3.1 provides that "a lawyer must not assert an issue in any proceeding 'unless there is a basis for doing so that is not frivolous.' " *Shahideh,* 277 Mich App at 117 n 1. It then said that an attorney "would violate this ethical obligation by filing a written notice of intent to raise the insanity defense before adequately investigating the viability of such a defense and forming a sufficient basis to believe that the defense is warranted." *Id.* While I conceptually agree that it might be possible for a defense attorney to violate MRPC 3.1 by filing a notice of intent pursuant to MCL 768.20a when there is *no basis* for doing so, it must be recalled that defense counsel has a constitutional duty to provide effective assistance of counsel and that this includes investigating defenses.[24]

A nonfrivolous basis for filing a notice of intent under MCL 768.20a certainly existed in this case where defense counsel knew that defendant had been diagnosed with bipolar disorder and had been prescribed psychiatric medications. Indeed, the prosecutor's willingness to stipulate a referral further suggests that a nonfrivolous basis existed in the case at bar.

In the course of responding to the prosecutor's argument that a defendant can always withdraw a notice of intent, the Court of Appeals said:

> A notice of intent to pursue the insanity defense under MCL 768.20a(1) is a party admission. MRE 801(d)(2); see also *People v McCray*, 245 Mich App 631, 635; 630 NW2d 633 (2001) (notice of alibi defense, as a party admission, is admissible for purpose of impeachment). Therefore, even if a defendant withdraws his or her initial written notice, the prosecution remain [sic] free to use the contents of the notice as impeachment evidence at trial. [*Shahideh*, 277 Mich App at 118 n 2.]

This is incorrect. A notice of intent under MCL 768.20a is not a party admission that is admissible for the purpose of impeachment. The filing of a notice is nothing more than an assertion that one intends to submit

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[24] "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691 (1984). See also *Avery v Prelesnik*, 548 F3d 434 (CA 6, 2008) (affirming that defendant "was deprived of his right to effective assistance of counsel when his attorney failed to investigate and interview potential alibi witnesses").

testimony that a defendant was insane when the crime was committed.[25] Indeed, as stated in *People v Martin,* 386 Mich 407, 427 (1971), "a plea of not guilty by reason of insanity is not a plea that incriminates."

While the filing of a notice of alibi is a party admission, as explained in *McCray*, the filing of a notice of insanity is not. Unlike a notice of alibi, a notice of intent to pursue an insanity defense does not require a defendant to admit anything more than that he or she was not sane when the crime occurred.

In *McCray,* the defendant argued that his notice of alibi should be treated like statements a defendant makes to an examining psychiatrist, which are not admissible pursuant to MCL 768.20a(5) if the defendant later chooses not to pursue an insanity defense. The Court of Appeals rejected this argument because the alibi statute has no counterpart to subsection 5 of MCL 768.20a, i.e., a provision that prohibits the admission of statements made during an examination, including for purposes of impeachment.[26] Thus, the Court of Appeals in the instant case erred in relying on *McCray* for the proposition that a notice of intent to assert an insanity defense is a party admission.

For all these reasons, I conclude that if defense counsel has sufficient information to warrant a defendant's evaluation for insanity, he or she must file a notice of intent pursuant to MCL 768.20a.[27] After the

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[25] Moreover, as for things a defendant might say while being examined, MCL 768.20a(5) provides:

> Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense.

Thus, the Legislature has expressly forbidden the admission of anything a defendant says during an examination for any issue other than mental illness or insanity. If a defendant decides not to pursue an insanity defense, after having filed a notice of intent and having been examined, thus removing defendant's sanity as an issue from the trial, anything the defendant said during the insanity examinations may not be admitted at trial. Hence the Court of Appeals clearly erred in stating that defendant had to give up his Fifth Amendment right against self-incrimination in order to pursue an insanity defense. Toma, 462 Mich at 294.

[26] *McCray*, 245 Mich App at 636, citing *People v Toma*, 462 Mich at 293.

[27] I also reject the Court of Appeals remedy in this case. The Court of Appeals said: "If the psychologist and defense counsel find that there is a triable issue concerning defendant's sanity at the time of the charged offense, then the trial court shall vacate defendant's conviction and a new

defendant is first examined at the forensic center, the defendant is free to request an independent evaluation pursuant to MCL 768.20a(3). Because defendant's motion made MCL 768.20a applicable, defense counsel's failure to invoke the statute precludes a finding of error.

VIII. EFFECTIVE ASSISTANCE OF COUNSEL

After concluding that the statute did not apply, the Court of Appeals went on to hold that the trial court's denial of defendant's motion violated his constitutional right to the effective assistance of counsel because it deprived his attorney of the opportunity to investigate a potential insanity defense. *Shahideh,* 277 Mich App at 120-121.

It is true that under certain circumstances, even when counsel's performance is not intrinsically deficient, a defendant's right to the effective assistance of counsel may be denied by government action, *Bell v Cone*, 535 US 685, 696 n 3 (2002), and that a defendant's right to the effective assistance of counsel is violated in "cases in which the court or the state directly interferes with the attorney-client relationship by preventing counsel from rendering assistance." *People v Mitchell*, 454 Mich 145, 154 (1997).[28] However, these holdings are inapplicable to this case. The Court of Appeals analysis is deficient in several regards. First, defense counsel did investigate a potential insanity defense. This is how he learned that defendant had been diagnosed with bipolar disorder and had been prescribed psychiatric medications. Second, the trial court's refusal to allow a visit at the jail, well beyond the time normally allowed for visits, did not completely preclude further investigation. The psychologist could in fact have visited defendant in the jail for short periods within the visitation policies of the jail. Also, the psychologist presumably could have spoken with defendant on the telephone. Seen in this light, the trial court's ruling was quite limited. It did not forbid the psychologist from meeting defendant or speaking with defendant. The trial court only refused to require the sheriff to allow visits of longer duration than are allowed under existing visitation policies at the jail. I conclude that the trial court's denial of defendant's motion did not rise to the level of directly interfering with the attorney-client relationship by preventing counsel from rendering assistance.

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trial shall be held." *Shahideh*, 277 Mich App at 121-122. I reject the suggestion that whether a defendant is entitled to a new trial is subject to decision by anyone other than a judge. Only a judge can grant a new trial if it is warranted under the proper standard of review. See *People v Carines*, 460 Mich 750, 774 (1999).

[28] It is also true that a criminal defendant is denied the effective assistance of counsel by his attorney's failure to investigate and present a meritorious insanity defense, *People v Hunt*, 170 Mich App 1, 13 (1988), *People v Parker*, 133 Mich App 358, 363 (1984), and *People v McDonnell*, 91 Mich App 458, 461 (1979), but defendant does not argue that this line of cases applies.

I also note that the trial court's order certainly did not prevent defendant from obtaining an independent evaluation. The trial court's order expressly allowed such an evaluation if defendant filed a notice of intent and was examined at the forensic center first. But, as previously mentioned, after the trial court's ruling, defense counsel never filed a notice of intent, and instead chose to present a mitigation defense. Requiring defendant to pursue an insanity defense in compliance with the statute did not deny defendant his right to the effective assistance of counsel.

IX. CONCLUSION

An incarcerated defendant is not entitled to a court order requiring the sheriff to make the defendant available in the jail for a period beyond that allowed by existing jail visitation policies so that the defendant may be examined by a psychologist in order to help defense counsel decide whether to file a notice of intent under MCL 768.20a. An incarcerated defendant has no right to an independent evaluation under MCL 768.20a until a notice of intent has been filed, and the defendant has first been examined at the forensic center. In my judgment, the statute becomes applicable as soon as defense counsel's preliminary investigation produces sufficient information for counsel to decide to have his or her client examined for insanity.

I also would hold that the trial court's denial of defendant's motion did not violate defendant's constitutional right to the effective assistance of counsel.

CORRIGAN, J. I join the statement of Chief Justice TAYLOR.

YOUNG, J. (*concurring*). I concur in this Court's order reversing the Court of Appeals judgment and reinstating defendant's conviction because he waived appellate relief. I write separately to address Justice CAVANAGH's dissent.

Defendant sought a court order permitting a privately retained psychologist to examine him while he was in jail for the purpose of evaluating the merits of an insanity defense. Defendant sought the order because he had previously been diagnosed as bipolar and prescribed Prozac, Xanax, and Ritalin. Defendant contended that the court order was necessary because the evaluation would take more time than permitted by ordinary jail visitation hours. The trial court denied defendant's motion, ruling that defendant must first file a notice of intent to assert an insanity defense pursuant to MCL 768.20a(1) and participate in an examination by the Center for Forensic Psychiatry[1] before he could obtain an evaluation by his privately retained expert. Defendant did not pursue his insanity defense by filing a § 20a(1) notice as directed by the trial court. Instead, defendant abandoned his insanity defense in favor of a mitigation defense. Defendant's mitigation defense proved unsuccessful, as a jury convicted him of first-degree murder.

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[1] See MCL 768.20a(2).

The Court of Appeals majority held that the trial court erred by denying defendant's pretrial motion and remanded for further proceedings consistent with its opinion. The prosecutor sought leave to appeal in this Court, and we have reversed the Court of Appeals judgment because defendant waived appellate relief on this issue.

As stated, I concur with this Court's order; the interpretation of MCL 768.20a(1) is moot because defendant intentionally abandoned his right to assert an insanity defense[2] and, therefore, waived relief related to raising that defense on appeal.[3] It is critical that the trial court's ruling, even if erroneous, did not prohibit defendant from pursuing an insanity defense.[4] Investigation of an insanity defense remained fully available to defendant. That defendant may have been erroneously deprived of an

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[2] See *People v Carines*, 460 Mich 750, 762 n 7 (1999), quoting *United States v Olano*, 507 US 725, 733 (1993).

[3] See *People v Carter*, 462 Mich 206, 215 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

[4] The trial court did not violate the defendant's right to present a defense. "There is no question that a criminal defendant has a state and federal constitutional right to present a defense." *People v Hayes*, 421 Mich 271, 278 (1984), citing Const 1963, art 1, §§ 13, 17, 20, and US Const, Ams VI, XIV. The protections afforded by that right were described in *Washington v Texas*, 388 US 14, 19 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

The United States Supreme Court has additionally observed:

> [T]he cases in which we have invoked this principle [the right to present a defense] dealt with the exclusion of evidence, see, *e.g.*, *Crane v Kentucky*, [476 US 683 (1986)]; *Chambers v Mississippi*, 410 U.S. 284; 93 S. Ct. 1038; 35 L. Ed. 2d. 297 (1973), or the testimony of defense witnesses, see, *e.g.*, *Webb v Texas*, 409 U.S. 95; 93 S. Ct. 351, 34 L. Ed. 2d. 330 (1972) *(per curiam); Washington v Texas*, [*supra*]. None of them involved restrictions imposed on a defendant's ability to present an affirmative defense. [*Gilmore v Taylor*, 508 US 333, 343 (1993).]

The right to present a defense has only been invoked to reverse a conviction when the defendant was completely precluded from offering

opportunity for an independent evaluation before filing a § 20a(1) notice is irrelevant in light of defendant's subsequent decision to abandon the investigation of his insanity defense. Indeed, the trial court's order expressly instructed defendant that he "has the right to full access to an evaluation by a clinician of his choosing—at the appropriate time." Thus, the trial court's order neither prohibited defendant from investigating his insanity defense nor obtaining the independent evaluation that his motion sought.

This case is not analogous to a defendant seeking to offer evidence, but being denied the opportunity by an erroneous ruling by the court. Rather, this case is more analogous to a defendant offering evidence and the trial court denying its admission but instructing the defendant that he may introduce the same evidence through another witness. In that situation, if the defendant refuses to call that alternative witness or offer

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relevant and material evidence or testimony on the basis of a rule or decision that was " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *United States v Scheffer*, 523 US 303, 308 (1998), quoting *Rock v Arkansas*, 483 US 44, 56 (1987). See, e.g., *Washington*, *supra* (holding that a Texas statute that prohibited the defendant from presenting the testimony of a coparticipant who would have confessed to the charged crime violated the defendant's right to present a defense); *People v Whitfield*, 425 Mich 116, 124 n 1 (1986) (holding that barring the defendant from presenting the testimony of a medical expert violated the defendant's right to present a defense).

Unlike in *Washington* and *Whitfield*, the trial court's ruling here did not completely prohibit defendant from "present[ing] his own witness[] to establish a defense." *Washington*, *supra* at 19. The trial court merely required that defendant file a notice and submit to an examination at the Center for Forensic Psychiatry first. If defendant had complied, he could have presented witnesses in support of an insanity defense. Instead, defendant abandoned the defense.

Moreover, in *Hayes*, *supra* at 279, this Court recognized that "there is no constitutional right to assert an insanity defense." The Legislature is free to define the defense and place limitations and requirements on its exercise. See *Speiser v Randall*, 357 US 513, 523 (1958) ("It is of course within the power of the State to regulate procedures under which its laws are carried out . . . ."); *Leland v Oregon*, 343 US 790, 798 (1952) (holding Oregon's statute requiring a defendant to prove his insanity beyond a reasonable doubt was not unconstitutional); *Clark v Arizona*, 548 US 735, 748-749 (2006) (holding that Arizona's narrowed definition of insanity was not unconstitutional). I believe that the Legislature could impose the requirements that the court imposed in this case (albeit arguably erroneously). Thus, those requirements did not infringe the defendant's right to present a defense such that his waiver can be excused.

the evidence through that witness, then he has abandoned his right to present that evidence to the jury and cannot obtain relief on appeal. Indeed, as this Court has instructed, defendant "may not harbor error as an appellate parachute."[5]

Justice CAVANAGH suggests that defendant did not waive his insanity defense because after the trial court's ruling he had to choose between two alternatives, each with its own consequences.[6] As Justice CAVANAGH explains, however, defendant *chose* not to submit to the Center for Forensic Psychiatry examination because he wanted to protect the secrecy of his trial strategy. Thus, defendant had a choice to continue pursuing his insanity defense and chose to abandon it as a matter of trial strategy. Waiver is not excused simply because the defendant was faced with a difficult decision and regrets the strategic choice that he made.

Defendant was fully aware that he could file a § 20a(1) notice and continue pursuing an insanity defense, but elected to abandon it in favor of a mitigation defense. Defendant cannot obtain appellate relief because his chosen defense strategy failed. Accordingly, I concur in this Court's order reinstating defendant's conviction.

CAVANAGH, J. (*dissenting*).

I. FACTS AND PROCEDURE

In this case, defendant murdered his girlfriend under circumstances that indicate the possibility that he was suffering from a psychological disorder. After being arrested, defendant was being held in the county jail while awaiting trial. Defense counsel began investigating an insanity defense, which required a psychiatric evaluation of defendant. Accordingly, defense counsel requested a court order to mandate that defendant

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[5] *Carter*, *supra* at 214.

[6] Justice CAVANAGH contends that defendant believed he had no real choice between pursuing an insanity defense and waiving his right to such defense, because the trial court's order would force defendant to admit guilt by submitting a notice of intent and undergoing an examination by the Center for Forensic Psychiatry, and would force defense counsel to violate the Michigan Rules of Professional Conduct if defendant later decided to not pursue the insanity defense. Yet, the trial court's order clearly stated that "any statements made by Defendant during the examination are admissible only on the issue of his mental illness or insanity." Additionally, the notice of intent must only "state, as particularly as is known to the defendant or the defendant's attorney, the name of a witness to be called in behalf of the defendant to establish" the insanity defense. MCL 768.21(1). Finally, defense counsel would not have violated the Rules of Professional Conduct by filing the notice of intent, because he had, in fact, gathered sufficient information during his investigation to lead him to conclude that an insanity defense might be a possibility.

be allowed to be evaluated by an independent psychologist while in jail. The trial court denied defendant's request. It reasoned that, before he could obtain an independent evaluation, defendant must first file a notice of intent to assert an insanity defense pursuant to MCL 768.20a(1) and undergo an examination by the Center for Forensic Psychiatry (CFP) pursuant to MCL 768.20a(2). Defendant did not file a § 20a(1) notice because he had been unable to get a professional opinion about his sanity because the trial court precluded an in-jail evaluation. Defendant's counsel also believed that had he filed a § 20a(1) notice and later decided not to present an insanity defense, the filing could be used against his client as an admission of guilt. Accordingly, defense counsel investigated and presented a defense that was not based on insanity. A jury convicted defendant of first-degree murder.

The Court of Appeals majority held that the trial court erred in denying defendant's pretrial motion because "only a defendant who 'plan[s]' or 'intend[s]' to raise the insanity defense at trial must comply with the procedures set forth in MCL 768.20a." *People v Shahideh*, 277 Mich App 111, 116 (2007), quoting *Random House Webster's College Dictionary* (1997) for the definition of "propose." The Court of Appeals majority explained that MCL 768.20a did not apply to defendant's motion:

> A mere request to investigate and examine the viability or feasibility of a potential insanity defense is not sufficient to trigger the statute. We conclude that defendant's request for an independent psychological evaluation was not governed by MCL 768.20a because the defense had not yet "propose[d] to offer" an insanity defense in this case. [*Id*. at 117.]

The Court of Appeals majority remanded for further proceedings consistent with its opinion. It did not reach the merits of defendant's equal protection claim because its decision rested on the fact that the trial court had misinterpreted the statute.

We granted the prosecution's application for leave to appeal. We were specifically interested in interpreting the statute and evaluating the inner workings of its various subparts.[1] The majority order reverses the

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[1] No justices dissented from the order granting leave to appeal and requesting briefing on

> (a) whether MCL 768.20a governs a request by an incarcerated defendant for an independent psychiatric evaluation to determine whether an insanity defense may be available where no notice of intention to assert an insanity defense has been filed; (b) if the statute governs, whether the subsections of MCL 768.20a are to be construed seriatim, such that an independent psychiatric evaluation may not be requested under subsection 3 without first complying with subsections 1 and 2; and, (c) if the statute does not apply, whether the defendant's constitutional rights were violated

Court of Appeals, basing its decision on the heretofore unlitigated issue of waiver. In sum, the majority order holds that defendant waived his right to present an insanity defense.

II. ANALYSIS

A. WAIVER

I disagree with the majority order's conclusion that defendant is precluded from appellate relief because he had waived his right to present an insanity defense. "Waiver is the intentional relinquishment of a known right." *Bailey v Jones*, 243 Mich 159, 162 (1928). In this case, defendant was being held in the county jail while awaiting trial. During this time, his attorney realized that defendant's mental illness and medications, coupled with his irregular behavior, indicated that he might have been legally insane when the crime was committed. Accordingly, defense counsel began investigating an insanity defense, which required a psychiatric evaluation of defendant. To accomplish this, defense counsel made a pretrial motion asking the trial court to allow an independent psychologist access to defendant while defendant was incarcerated. Defense counsel also asked for the prosecutor's stipulation for such an evaluation. In order to substantiate the need for this evaluation, defense counsel offered to present to both the prosecutor and the trial court defendant's medical records, which reflected an earlier diagnosis of bipolar disorder and applicable treatment plans, including prescriptions for psychiatric medications. The prosecutor refused to stipulate an evaluation, and the trial court wrongly applied the statute to deny defendant's request for an independent evaluation.[2]

Defense counsel was then left with the Hobson's choice of forgoing the insanity defense, for lack of investigation, or filing a notice of intent and submitting to an examination by the state-run CFP. Defense counsel did not want a CFP examination until defendant had undergone an independent evaluation because counsel wanted to protect the secrecy of his trial strategy. Defense counsel also thought that if he filed a § 20a(1) notice and submitted defendant to the CFP examination, such an action could be seen as an admission of guilt and a violation of the Michigan Rules of Professional Conduct if he later elected not to present an insanity defense. While these were incorrect conclusions, they nonetheless speak to whether defendant intentionally waived a known right. In essence, defense counsel subjectively believed that, on one hand, he could submit defendant to the CFP examination and risk his client's case and his

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by the trial court's decision to deny access to the defendant for an independent psychiatric evaluation while he was in jail. [480 Mich 1195 (2008).]

[2] See Part II(B), *infra*, explaining how the trial court misconstrued the statute to preclude defendant from obtaining an independent evaluation.

license to practice law, or, on the other hand, he could not submit defendant to the CFP examination, abandon the nascent insanity defense for lack of an investigation, and present some other fully developed defense strategy. And, it was solely the trial court's misreading of the statute that placed defense counsel in this precarious position.[3] Forced to choose, defense counsel understandably elected to avoid the CFP examination and to present an alternative defense. This does not evince a decision to intentionally relinquish a known right. Rather, these facts reflect the opposite—defense counsel was essentially forced to comply with a misapplication of the statute or forgo investigating an insanity defense.[4] Accordingly, defendant did not waive his right to present an insanity defense, and he

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[3] In fact, if the trial court had interpreted the statute correctly, this problem would have been obviated because defense counsel would have been able to secure the independent evaluation and then present the insanity defense in compliance with the statute or simply abandon it by never filing a notice of intent.

[4] The majority order holds that defendant made a strategic choice to abandon an insanity defense. First, the existence of a mere *choice* does not establish waiver. Waiver requires an intentional relinquishment of a known right. This defendant did not intentionally relinquish his right to investigate an insanity defense through an independent evaluation. On the contrary, he expressly requested such an evaluation and litigated his rights in that regard. Second, even if the order were correct that the mere existence of a choice could establish a waiver, I would hold that a choice between having a statute misapplied or losing one's right to fully investigate a defense does not constitute a choice. Further, contrary to the order's assertion, defendant did not have enough information to "propose[] to offer in his . . . defense testimony to establish his . . . insanity at the time of an alleged offense," such that he should have been forced to file a notice under MCL 768.20a(1). Instead, defendant lacked that information, and he was expressly trying to gain that information (or testimony) through the independent evaluation that was wrongly denied to him. Indeed, being denied this information was the impetus for his appeal to the Court of Appeals. Thus, the order is simply wrong to suggest that defendant had enough information to make a "good faith" decision on whether to file a § 20a(1) notice. Notwithstanding the fact that "good faith" is nowhere in the statute, this defendant's choice to forgo his right to an independent evaluation was no more of a waiver of his right to investigate and present an insanity defense than a defendant's choice to confess without being given the advice of rights required by *Miranda v Arizona*, 384 US 436 (1966), constitutes a knowing and intentional waiver of his right to remain silent—especially when that defendant had previously requested to remain silent.

is entitled to appellate relief.[5]

Despite it being the season for surprises, I share the parties' presumed surprise in waking to see that this waiver issue controls this case. Indeed, it is truly a magical delivery that waiver presents itself now, after it being wholly absent from the parties' arguments, the lower courts' decisions, and this Court's order granting leave to appeal.

B. STATUTORY INTERPRETATION

Because defendant did not waive his rights under the statute, I now analyze the statute's application in this case, which is what we initially indicated that the entire Court would do. On that issue, I would affirm the Court of Appeals to the extent it holds that the statute does not preclude a criminal defendant from obtaining an independent psychological evaluation before delivering a § 20a(1) notice and submitting to a CFP examination.

I also must respond to Chief Justice TAYLOR's interpretation of the statute. He concludes that the statute requires a criminal defendant to file a notice of intent any time he merely "considers" investigating an insanity defense. This interpretation is wrong and inherently paradoxical.

In statutory interpretation, words must be understood in their grammatical context. *Herman v Berrien Co*, 481 Mich 352, 366 (2008). MCL 768.20a(1) states:

> If a defendant in a felony case proposes to offer in his or her defense testimony to establish his or her insanity at the time of an alleged offense, the defendant shall file and serve upon the court and the prosecuting attorney a notice in writing of his or her intention to assert the defense of insanity not less than 30 days before the date set for the trial of the case, or at such other time as the court directs.

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[5] I also believe that defendant has presented a valid equal protection claim. Defendant would have been free to obtain an independent evaluation had he been free on bond. The only reason he was not allowed to obtain such an evaluation was because he was being held in jail. I do not believe defendant waived his right to present an insanity defense; nonetheless, assuming that defendant did waive that right, such a waiver could only have occurred after defendant was treated differently under the statute than a defendant who was free on bond. It is undisputed that defendant requested an independent evaluation. Defendant was then denied that right under color of the statute. It was only after that denial that defendant allegedly waived his right to present an insanity defense. Thus, defendant's equal protection claim regarding his treatment under the statute is still viable, despite any alleged post hoc waiver, because it is that disparate treatment that undoubtedly caused any alleged waiver. In other words, if defendant would have been treated equally under the statute, the waiver issue would never have arisen. See n 4 *supra*. Thus, defendant still deserves an adjudication of his equal protection claim. And the majority order should explain its conclusion to the contrary.

A defendant must file a notice when he "proposes to offer in his or her defense testimony to establish his . . . insanity at the time of an alleged offense." Essential to a proper definition of "propose" is the object of the proposal: "to offer . . . *testimony*." This suggests that the defendant should first have testimony to offer in order to make a "proposal" pursuant to § 20a(1). A defendant who has testimony to offer has gone beyond merely "considering" the defense; such a defendant has formulated a "plan" or "intent" to pursue an insanity defense at trial.

Moreover, "the entire act must be read, and the interpretation to be given to a particular word in one section, arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183 (1922). MCL 768.21(1) is relevant to the scope of "propose" in § 20a(1):

> If the defendant fails to file and serve the written notice prescribed in section 20 or 20a, the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi or the insanity of the defendant. If the notice given by the defendant does not state, as particularly as is known to the defendant or the defendant's attorney, the name of a witness to be called in behalf of the defendant to establish a defense specified in section 20 or 20a, the court shall exclude the testimony of a witness which is offered by the defendant for the purpose of establishing that defense.

The second sentence of § 21(1) indicates that the Legislature did not intend to foreclose independent evaluations before the defendant has filed a § 20a(1) notice. Section 21(1) requires the defendant to identify the witness whose testimony is proposed in the § 20a(1) notice "as particularly as is known," and if the witness is not sufficiently identified, his testimony is excluded from trial. Thus, § 21(1) reinforces the conclusion that a defendant should have testimony (from a particular witness) in order to make a "proposal" pursuant to § 20a(1). If a defendant can provide "the name of a witness to be called in behalf of the defendant to establish [an insanity] defense," that defendant has likely gone beyond mere "consideration" of the defense.

Also, MCL 768.20a(2) through (7) clearly set forth a comprehensive procedure for the parties to follow *after* the defendant files a § 20a(1) notice. The procedure specific to raising an insanity defense *before* the defendant files a notice, however, is not expressly provided by statute. The procedure *after* a § 20a(1) notice is filed has no relevance to the procedure *before* a § 20a(1) notice is filed. Only the provisions addressing the content of a notice address prenotice procedure by implication. MCL 768.20a(1) and 768.21(1). Those provisions encourage defendants to have testimony to offer before filing a § 20a(1) notice, and neither provision suggests a limitation on the source of testimony. Indeed, expert testimony is a form of testimony that a defendant may "offer in his . . . defense . . . to establish his . . . insanity at the time of an alleged offense." MCL 768.20a(1). Thus, I do not believe that the Legislature intended to foreclose independent evaluations before a defendant has filed a § 20a(1) notice.

In this case, at the time of his motion, defendant was not offering testimony. Instead, his motion sought to potentially obtain "testimony to establish his . . . insanity at the time of [the] alleged offense." Accordingly, I believe that the Court of Appeals correctly held that the trial court erred and defendant was not prohibited under the statute from obtaining some corroboration from an independent evaluation before filing a notice of intent pursuant to § 20a(1).

Chief Justice TAYLOR's contrary, broad interpretation of "propose" would foreclose a defendant from investigating an insanity defense before filing a § 20a(1) notice. But the chief justice's own statement contradicts that very understanding of the statute. The chief justice states: "The psychologist could in fact have visited defendant in the jail for short periods within the visitation policies of the jail." It makes no sense that the chief justice would say that a defendant could not obtain an independent evaluation before filing a notice of intent, but then also say that defendant would be free to meet with an independent evaluator. If a defendant intends to meet with a psychologist for an independent evaluation, whether within jail visitation hours or while free on bond, certainly that defendant has "considered" offering testimony to establish insanity as defined by the chief justice. Thus, the chief justice's rule contradicts itself as it applies to this case.

Further, the chief justice's interpretation lacks foresight by failing to recognize that, under it, all future defendants are precluded from proffering insanity defenses if they merely contemplate seeking an independent psychiatric evaluation before filing a § 20a(1) notice. Noncompliance with the statute precludes use of the insanity defense. *People v Hayes*, 421 Mich 271 (1984). As noted, the chief justice would allow the instant defendant to meet with an independent psychologist before filing a notice, but he would preclude that meeting if it were seen as defendant "considering" presenting an insanity defense, which would then result in him losing any possibility of presenting an insanity defense under *Hayes*. Taken to its logical end, the chief justice's interpretation of the statute would apply *Hayes* to preclude any insanity defense to a defendant whose attorney simply sat alone in his office and contemplated, or studied, an insanity defense before filing a § 20a(1) notice. The Legislature could not have intended this illogical result. But this is the illogical interpretation that the trial court applied in this case. Therefore, defendant was wrongly denied an independent evaluation.

III. CONCLUSION

The Court of Appeals was correct to conclude that the trial court misconstrued the statute. But, that Court granted an inappropriate remedy by allowing the defendant and his independent psychologist to unilaterally decide if a new trial was necessary. Instead, I would order that the following progressive steps be taken: (1) remand the case to allow defendant the opportunity to obtain an independent evaluation; (2) if, after the evaluation, defense counsel maintains that he would have gone forward with the insanity defense, then defendant must comply with the statute's provisions with respect to filing a § 20a(1) notice and submitting to a CFP examination; (3) then, the trial court must conduct

an evidentiary hearing to consider the insanity evidence that each side would have presented at trial; and (4) the trial court should then rule on the applicability of the harmless error rule, assuming that defendant would have been able to present his insanity evidence.[6]

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

PEOPLE v MERCER, No. 135811. By order of July 25, 2008, this Court, in lieu of granting leave to appeal, remanded this case to the Ingham Circuit Court to rule on the defendant's motion to quash the bindover, and directed that court to file with the Clerk of the Supreme Court a transcript of the hearing and related documents. In an order faxed to this Court on August 25, 2008, the Ingham Circuit Court granted the defendant's motion to quash the bindover "for the reasons that there was no probable cause to bind the case over for trial and no evidence a crime was actually committed." Subsequently, the prosecution informed the Clerk of the Supreme Court that it would not be proceeding further in the prosecution. Accordingly, the application for leave to appeal is denied as moot. Court of Appeals No. 281006.

Leave to Appeal Denied December 30, 2008:

MCINTYRE v CHAVALI, No. 136297; Court of Appeals No. 274526.

MCINTYRE v MOHAN, No. 136299; Court of Appeals No. 274462.

PEOPLE v ASHWORTH, No. 136548; Court of Appeals No. 273817.

PEOPLE v LEONARD MCCOY, No. 136652. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 281711.

PEOPLE v MICHAEL VANCE, No. 136670. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282797.

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[6] The trial court may also have violated defendant's constitutional right to present a defense. Criminal defendants have a constitutional right to present a defense. *Hayes*, *supra* at 278. Under MCL 768.20a, the Legislature has given defendants in Michigan the opportunity to present an insanity defense. A state rule may not impinge on the defendant's right to present a defense by arbitrarily limiting defense strategies or arguments. *Washington v Texas*, 388 US 14, 22 (1967). In this case, the statute was wrongly applied to deny defendant his right to have an initial independent evaluation. Accordingly, I am not convinced that the trial court in this case did not unconstitutionally infringe defendant's right to present a defense by arbitrarily affecting his defense strategy by misapplying the statute. Nonetheless, I do not reach this issue because I believe that defendant is entitled to relief on his statutory claim of error.

BLASZCZYK v LIBERTY MUTUAL FIRE INSURANCE COMPANY, No. 136742; Court of Appeals No. 275553.

PEOPLE v PETRI, No. 136775; reported below: 279 Mich App 407.

BUSSA v BUSSA, No. 136792; Court of Appeals No. 272805.

SHUBH HOTELS DETROIT, LLC v WELLS OPERATING PARATING PARTNERSHIP, LP, No. 136883; Court of Appeals No. 276666.

VODOPYANOV v KELLER WILLIAMS REALTY NOTHRVILLE MARKET CENTER, No. 136939; Court of Appeals No. 274460.

PEOPLE v DURAN, No. 136948; Court of Appeals No. 276295.

CARR v FORD MOTOR COMPANY, Nos. 137025 and 137026; Court of Appeals Nos. 273675 and 274251.

OKRIE v ETTEMA BROTHERS, No. 137040; Court of Appeals No. 275630.

HEERINGA v PETROELJE, No. 137051; reported below: 279 Mich App 444.

PEOPLE v GOSS, No. 137096; Court of Appeals No. 277142.

PEOPLE v BROCK, No. 137097; Court of Appeals No. 286041.

PEOPLE v TORIAL BROWN, No. 137103. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284413.

PEOPLE v MURRAY, No. 137106; Court of Appeals No. 270983.

PEOPLE v MICHAEL CURRY, No. 137107; Court of Appeals No. 277371.

PEOPLE v LAWTON, No. 137127. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285705.

CITY OF GRAND RAPIDS v BRIGHT, No. 137137; Court of Appeals No. 277604.

PEOPLE v RAYMOND HALL, No. 137138. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284107.

NOWAK v BAY COUNTY, No. 137165; Court of Appeals No. 279076.

PEOPLE v HUDSON, No. 137166; Court of Appeals No. 285876.

PEOPLE v NATURALITE, No. 137176. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282852.

SMITH v PARKLAND INN/CASUALTY RECIPROCAL EXCHANGE, No. 137178; Court of Appeals No. 278676.

PEOPLE v TURKETTE, No. 137182; Court of Appeals No. 283829.

PEOPLE v GOODIN, No. 137184; Court of Appeals No. 285729.

PEOPLE v STANLEY PARKER, No. 137191. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282368.

PEOPLE v ANTONIO ROBERTSON, No. 137193; Court of Appeals No. 276092.

GAGGO v KENNEDY, No. 137200; Court of Appeals No. 278607.

PEOPLE v RHASHI HARRIS, No. 137207. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284873.

ELMER'S CRANE & DOZER, INC v AWM CORPORATION, No. 137211; Court of Appeals No. 278229.

PEOPLE v RILEY, No. 137218; Court of Appeals No. 286150.

PEOPLE v LOWES, No. 137219; Court of Appeals No. 286159.

PEOPLE v STONE, No. 137234; Court of Appeals No. 278829.

PEOPLE v MARTINEZ, No. 137241; Court of Appeals No. 285786.

PEOPLE v STARKS, No. 137248. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282122.

PEOPLE v ARTISS WILLIAMS, No. 137253; Court of Appeals No. 278981.

PEOPLE v CHANDLER, No. 137259. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284929.

FAGERMAN v FAGERMAN, No. 137264; Court of Appeals No. 275027.

PEOPLE v WENGOROVIUS, No. 137267. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286686.

WALGREEN COMPANY v MACOMB TOWNSHIP, No. 137269; reported below 280 Mich App 58.

PEOPLE v WESLEY WILSON, No. 137271; Court of Appeals No. 276059.

GRUBKA v VAN DEUSEN, No. 137274; Court of Appeals No. 276322.

PEOPLE v GOODGER, No. 137277. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283544.

PEOPLE v WAKEFIELD, No. 137278; Court of Appeals No. 278554.

PEOPLE v FELLA, No. 137282; Court of Appeals No. 286449.

HAYCOCK v BOOMER, No. 137292; Court of Appeals No. 283982.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Order Entered September 4, 2008:

In re EXECUTIVE MESSAGE OF GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION, No. 137195. The Governor's September 2, 2008, executive message, pursuant to MCR 7.305(A)(1), requested this Court to authorize the Court of Appeals to certify a question relating to the removal proceeding to be conducted by the Governor against the mayor of Detroit. On the same date, the plaintiff mayor filed a claim of appeal in *Detroit Mayor v Governor* (Court of Appeals Docket No. 287462) and, by peremptory order of September 2, 2008, the Court of Appeals affirmed the Wayne Circuit Court and denied the plaintiff mayor's motion for a stay. On September 3, 2008, the plaintiff mayor filed in this Court (Docket No. 137197) an emergency application for leave to appeal from that Court of Appeals decision. This Court denied that application on September 4, 2008. Accordingly, in response to the executive message, we respectfully decline the request to authorize the certified question because it is effectively moot.

Order Entered September 15, 2008:

COOPER V AUTO CLUB INSURANCE ASSOCIATION, No. 132792. On order of the Court, the motion for rehearing is considered and, in lieu of granting rehearing, the opinion of the Court is amended by striking on pages 401 and 417 the language "Therefore, we reverse in part the judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this decision," and substituting in lieu thereof the language: "Therefore, we reverse in part the judgment of the Court of Appeals and remand the case to the Court of Appeals for it to address the remaining issues raised by the parties." Court of Appeals No. 261736.

CAVANAGH, WEAVER, and KELLY, JJ. We would deny rehearing.

Order Entered September 16, 2008:

PROPOSED AMENDMENT OF RULE 2.614 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.614 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

(A) Automatic Stay; Exceptions: Injunctions, Receiverships, and Family Litigation.

(1) Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry. If a motion for new trial, a motion ~~to alter or amend the judgment, a motion for judgment notwithstanding the verdict, or a motion to amend or for additional findings of the court~~ for rehearing or reconsideration, or a motion for other relief from judgment is filed and served within 21 days after entry of the judgment or within further time the trial court has allowed for good cause during that 21-day period, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order ~~on~~ deciding the motion, unless otherwise ordered by the court on motion for good cause. Nothing in this rule prohibits the court from enjoining the transfer or disposition of property during the 21-day period.

(2)-(3) [Unchanged.]

(B)-(G)[Unchanged.]

Staff Comment: The proposed amendments of MCR 2.614 are intended to make the rule consistent with recent amendments of MCR 2.119, 7.204, and 7.205, adopted May 28, 2008, and effective September 1, 2008, which clarified that a party who seeks to appeal to the Court of Appeals has 21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, to file a claim of appeal or an application for leave to appeal, if the motion is filed within the initial 21-day appeal period, or within further time the trial court has allowed for good cause during that 21-day period.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-24. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered September 17, 2008:

In re BARGLIND, No. 136881. The Judicial Tenure Commission having issued its decision and recommendation of discipline, and the Honorable Mary B. Barglind having consented to the commission's findings of fact and its recommendation for discipline, we accept the recommendation of the Judicial Tenure Commission and order that Judge Barglind be suspended for thirty days without pay, effective 21 days from the date of this order.

As we conduct our de novo review of this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000). We adopt the findings and conclusions of the Judicial Tenure Commission. Respondent was at all relevant times a Judge of the 41st Circuit Court. With no justifiable reason, respondent engaged in a pattern of delay in rendering decisions in matters submitted to her for review. In some instances, the delays exceeded two years. Respondent failed to respond over a several month period to numerous inquiries made by the State Court Administrative Office Regional Director regarding the status of various matters. On several occasions, respondent failed to report, as required by MCR 8.107, all matters that remained undecided for more than four months from the date submitted to respondent. After a January 2007 implementation plan was put in place, respondent failed to report all undecided matters to the State Court Administrative Office. Respondent's failure to promptly dispatch her judicial duties constituted misconduct on the bench that was prejudicial to the administration of justice.

The standards set forth in *Brown* are being applied to the following conclusions of the Judicial Tenure Commission, which we adopt as our own:

> The facts asserted in the Formal Complaint and established by the parties' stipulation in this matter show, by a preponderance of the evidence, that Respondent breached the standards of judicial conduct and is responsible for all of the following as alleged in the Formal Complaint:
>
> Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, § 30 and MCR 9.205;
>
> Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, § 30 and MCR 9.205;
>
> Persistent neglect in the performance of judicial duties, in violation of MCR 9.205(B)(1)(b);
>
> Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, and to bear in mind that the judicial system is for the benefit of the litigant and the public, not the judiciary, contrary to the Michigan Code of Judicial Conduct (MCJC), Canon 1;
>
> Irresponsible conduct which erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;
>
> Failure to respect and observe the law and so conduct herself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to MCJC, Canon 2B;
>
> Failure to promptly dispose of the business of the court, contrary to MCJC, Canon 3A(5) (Count I only);

Failure to diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitation [sic] the performance of the administrative responsibilities of other judges and court officials, contrary to MCJC, Canon 3B(1) (Count II only); and

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2).

JTC: Formal Complaint No. 83.

Orders Entered September 23, 2008:

PROPOSED AMENDMENT OF RULE 7.205 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering two alternative amendments of Rule 7.205 of the Michigan Court Rules. Before determining whether either of the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either proposal in its present form.

[The present language would be amended as indicated below:]

ALTERNATIVE A

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) Late Appeal.

(1)-(2) [Unchanged.]

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) [Unchanged.]

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the 12 months are counted from the entry of the order deciding the motion.

(c) The 12-month limitation period provided in subrule (F)(3) is tolled for the period when an appeal is pending pursuant to a claim of appeal.

(4)-(5) [Unchanged.]

(G) [Unchanged.]

ALTERNATIVE B

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) Late Appeal.

(1)-(2) [Unchanged.]

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) [Unchanged.]

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the 12 months are counted from the entry of the order deciding the motion.

(c) The 12-month limitation period provided in subrule (F)(3) is not tolled for the period when an appeal is pending pursuant to a claim of appeal, except as otherwise allowed by this rule.

(4)-(5) [Unchanged.]

(G) [Unchanged.]

Staff Comment: Alternative A would adopt the principle that the period in which to file an application for delayed appeal pursuant to MCR 7.205(F) is tolled while a claim of appeal is pending.

Alternative B would clarify that the period in which to file an application for delayed appeal pursuant to MCR 7.205(F) is not tolled while a claim of appeal is pending, except as allowed by the rule.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-40. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 2.112 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.112 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(J)[Unchanged.]

(K) Fault of Nonparties; Notice.

(1) Applicability. This rule applies to actions based on tort or another legal theory seeking damages for personal injury, property damage, ~~and~~or wrongful death to which MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249, apply.

(2)-(4)[Unchanged.]

(L)-(M) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.112 would clarify that the comparative negligence provisions apply to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death. This language would more closely parallel the statutory provisions of MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-41. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULES 7.302, 7.314, AND 7.316 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 7.302, 7.314, and 7.316 of the Michigan Court Rules. Before determining whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 7.302. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E)[Unchanged.]

(F) If, on its own initiative or on a party's motion, the court concludes that a brief does not substantially comply with the requirements of this rule, it may order the party who filed the brief to file a supplemental brief within a specified time correcting the deficiencies, or it may strike the nonconforming brief.

(F)-(H)[Unchanged but relettered (G)-(I).]

RULE 7.314 APPEALS IN WHICH NO PROGRESS HAS BEEN MADE.

(A)-(B)[Unchanged.]

(C) The court may dismiss an appeal, application, or an original proceeding for lack of jurisdiction or failure of a party to pursue the case in conformity with the rules.

RULE 7.316. MISCELLANEOUS RELIEF OBTAINABLE IN SUPREME COURT.

(A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers:

(1) exercise any or all of the powers of amendment of the court or tribunal below;

(2) on reasonable notice as it may require, allow substitution of parties by reason of marriage, death, bankruptcy, assignment, or any other cause; allow new parties to be added or parties to be dropped; or allow parties to be rearranged as appellants or appellees;

(3) permit the reasons or grounds of appeal to be amended or new grounds to be added;

(4) permit the transcript or record to be amended by correcting errors or adding matters which should have been included;

(5) adjourn the case until further evidence is taken and brought before it, as the Court may deem necessary in order to do justice;

(6) draw inferences of fact;

(7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require; or

(8) if a judgment notwithstanding the verdict is set aside on appeal, grant a new trial or other relief as it deems just.

(9) dismiss an appeal, application, or an original proceeding for lack of jurisdiction or failure of a party to pursue the case in conformity with the rules.

(B)-(D)[Unchanged.]

Staff Comment: These proposals would give the Supreme Court the authority to correct a deficient brief or to strike a nonconforming brief, similar to the authority given the Court of Appeals in MCR 7.212(I). The proposals would also allow the Supreme Court to dismiss a case in which a party failed to pursue the case in conformity with the rules.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-42. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered October 14, 2008:

PROPOSED AMENDMENT OF RULES 3.901, 3.903, 3.921, 3.965, 3.975, 3.976, 3.977, AND 3.978, AND NEW RULE 3.979 OF THE MICHIGAN COURT RULES. On

order of the Court, this is to advise that the Court is considering an amendment of Rules 3.901, 3.903, 3.921, 3.965, 3.975, 3.976, 3.977, and 3.978, and new Rule 3.979 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 3.901. APPLICABILITY OF RULES.

(A) [Unchanged.]

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901-3.928, 3.980, and 3.991-3.993 apply to delinquency proceedings and child protective proceedings;

(2) MCR 3.931-3.950 apply only to delinquency proceedings;

(3) MCR 3.951-3.956 apply only to designated proceedings;

(4) MCR 3.961-~~3.978~~3.979 apply only to child protective proceedings;

(5) MCR 3.981-3.989 apply only to minor personal protection order proceedings.

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(2)[Unchanged.]

(3) "Confidential file" means:

(a) [Unchanged.]

(b) the contents of a social file maintained by the court, including materials such as

(i)-(vi) [Unchanged from the language of the September 30, 2008, order, which will become effective January 1, 2009.]

(vii) information regarding the identity or location of a foster parent, preadoptive parent, ~~or~~ relative caregiver, or juvenile guardian.

(4)-(10)[Unchanged.]

(11) "Guardian" means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, and a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c.

(12) "Juvenile Code" means 1944 (1st Ex Sess) PA 54, MCL 712A.1 *et seq*., as amended.

(13) "Juvenile Guardian" means a person appointed juvenile guardian of a child by a Michigan court pursuant to MCL 712A.19a or MCL 712A.19c. A juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code.

(14~~13~~)-(27~~26~~)[Unchanged but renumbered.]

(B)-(E)[Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A)-(C)[Unchanged]

(D) Juvenile Guardianships. In a juvenile guardianship, the following persons shall be entitled to notice:

(1) the child, if 11 years old or older;

(2) the Department of Human Services;

(3) the parents of the child, unless parental rights over the child have been terminated;

(4) the juvenile guardian;

(5) any court that previously had jurisdiction over the child in a child protective proceeding, if different than the court that entered an order authorizing a juvenile guardianship;

(6) the attorneys for any party;

(7) the prosecuting attorney, if the prosecuting attorney has appeared in the case;

(8) any tribal leader, if there is an Indian tribe affiliation;

(9) any other person the court may direct to be notified.

(E)~~(D)~~ [Relettered but otherwise unchanged.]

RULE 3.965 PRELIMINARY HEARING.

(A)-(D) [Unchanged.]

(E) Advice; Initial Service Plan. If placement is ordered, the court must, orally or in writing, inform the parties:

(1) that the agency designated to care and supervise the child will prepare an initial service plan no later than 30 days after the placement;

(2) that participation in the initial service plan is voluntary unless otherwise ordered by the court;

(3) that the general elements of an initial service plan include:

(a) the background of the child and the family,

(b) an evaluation of the experiences and problems of the child,

(c) a projection of the expected length of stay in foster care, and

(d) an identification of specific goals and projected time frames for meeting the goals;~~ and~~

(4) that, on motion of a party, the court will review the initial service plan and may modify the plan if it is in the best interests of the child; and~~.~~

(5) that the case may be screened to determine its eligibility for concurrent planning.

The court shall direct the agency to identify, locate, and consult with relatives to determine if placement with a relative would be in the child's best interests, as required by MCL 722.954a(2). In a case to which MCL 712A.18f(6) applies, the court shall require the agency to provide the name and address of the child's attending physician of record or primary care physician.

RULE 3.975. POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A)-(E) [Unchanged.]

(F) Criteria.

(1) Review of Case Service Plan. The court, in reviewing the progress toward compliance with the case service plan, must consider:

(a) the services provided or offered to the child and parent, guardian, or legal custodian of the child;

(b) whether the parent, guardian, or legal custodian has benefited from the services provided or offered;

(c) the extent of parenting time or visitation, including a determination regarding the reasons either was not frequent or never occurred;

(d) the extent to which the parent, guardian, or legal custodian complied with each provision of the case service plan, prior court orders, and any agreement between the parent, guardian, or legal custodian and the agency;

(e) any likely harm to the child if the child continues to be separated from his or her parent, guardian, or custodian; and

(f) any likely harm to the child if the child is returned to the parent, guardian, or legal custodian.

(2) Progress Toward Returning Child Home. The court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care. The court shall also review the concurrent plan, if applicable.

(G)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(C) [Unchanged.]

(D) Hearing Procedure; Evidence.

(1) Procedure. Each permanency planning hearing must be conducted by a judge or a referee. Paper reviews, ex parte hearings, stipulated orders, or other actions that are not open to the participation of (a) the parents of the child, unless parental rights have been terminated; (b) the child, if of appropriate age; and (c) foster parents or preadoptive parents, if any, are not permanency planning hearings.

(2) Evidence. The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the permanency planning hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The court must consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, or relative with whom the child is placed, in addition to any other evidence offered at the hearing. The court shall obtain the child's views regarding the permanency plan in a manner appropriate to the child's age. The parties must be afforded an opportunity to examine and controvert written reports received by the court and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(E) Determinations; Permanency Options.

(1) In the case of a child who will not be returned home, the court shall consider in-state and out-of-state placement options. In the case of a child placed out-of-state, the court shall determine whether the out-of-state placement continues to be appropriate and in the child's best interest. The court shall ensure that the agency is providing appropriate services to assist a child who will transition from foster care to independent living.

~~(1)~~(2) Determining Whether to Return Child Home. At the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child. Failure to substantially comply with the case service plan is evidence that the return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being. In addition, the court shall consider any condition or circumstance of the child that may be evidence that a return to the parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being.

~~(2)~~(3) Continuing Foster Care Pending Determination on Termination of Parental Rights. If the court determines at a permanency planning hearing that the child should not be returned home, it ~~must~~ may order the agency to initiate proceedings to terminate parental rights~~, unless the agency demonstrates to the court and the court finds that it is clearly not in the best interests of the child to presently begin proceedings to terminate parental rights. The order must specify the time within which the petition must be filed, which may not be more than 42 days after the date of the order~~. Except as otherwise provided in this subsection, if the child has been in foster care under the responsibility of the state for 15 of the most recent 22 months, the court shall order the agency to initiate proceedings to terminate parental rights. If the court orders the agency to initiate proceedings to terminate parental rights, the order must specify the time within which the petition must be filed, which may not be more than 42 days after the date of the order. The court is not required to order the agency to initiate proceedings to terminate parental rights if one or more of the following apply:

(a) The child is being cared for by relatives.

(b) The case service plan documents a compelling reason for determining that filing a petition to terminate parental rights would not be in the best interest of the child. A compelling reason not to file a petition to terminate parental rights includes, but is not limited to, any of the following:

(i) Adoption is not the appropriate permanency goal for the child.

(ii) No grounds to file a petition to terminate parental rights exist.

(iii) The child is an unaccompanied refugee minor as defined in 45 CFR 400.111.

(iv) There are international legal obligations or compelling foreign policy reasons that preclude terminating parental rights.

(c) The state has not provided the child's family, during the period set in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts to reunify the family are required.

~~(3)~~(4) Other Permanency Plans. If the court does not return the child to the parent, guardian, or legal custodian, and if the agency demonstrates that termination of parental rights is not in the best interest of the child, the court may

(a) continue the placement of the child in foster care for a limited period to be set by the court while the agency continues to make reasonable efforts to finalize the court-approved permanency plan for the child, ~~or~~

(b) place the child with a fit and willing relative, ~~or~~

(c) upon a showing of compelling reasons, place the child in an alternative planned permanent living arrangement, or

(d) appoint a juvenile guardian for the child pursuant to MCL 712A.19a and MCR 3.979.

The court must articulate the factual basis for its determination in the court order adopting the permanency plan.

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(C) [Unchanged.]

(D) Suspension of Parenting Time. If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition. ~~is automatically suspended and, except as otherwise provided in this subsection, remains suspended at least until a decision is issued on the termination petition. If a parent whose parenting time is suspended establishes, and the court determines, that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate.~~

(E) Termination of Parental Rights at the Initial Disposition. The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

(1) the original, or amended, petition contains a request for termination;

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established and that termination of parental rights is in the child's best interest;

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n).

~~; unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child.~~

(F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.

(1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if

(a) the supplemental petition for termination of parental rights contains a request for termination;

(b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:

(i) are true; and

(ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (l), (m), or (n); and

(iii) that termination of parental rights is in the child's best interest.

~~unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule G(2), that termination of parental rights is not in the best interests of the child.~~

(2) Time for Hearing on Petition. The hearing on a supplemental petition for termination of parental rights under this subrule shall be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

(G) Termination of Parental Rights; Other. If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).

(1) Time.

(a) Filing Petition. The supplemental petition for termination of parental rights may be filed at any time after the initial dispositional review hearing, progress review, or permanency planning hearing, whichever occurs first.

(b) Hearing on Petition. The hearing on a supplemental petition for termination of parental rights under this subrule must be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

(2) Evidence. The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports ~~so~~ received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(3) Order. The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made, if the court finds on the basis of clear and convincing evidence admitted pursuant to subrule (G)(2) that one or more facts alleged in the petition

(a) are true, and

(b) come within MCL 712A.19b(3), and

(c) that termination of parental rights is in the child's best interest.

~~unless the court finds by clear and convincing evidence that termination of parental rights to the child is not in the best interest of the child.~~

(H)-(J) [Unchanged.]

RULE 3.978. POST-TERMINATION REVIEW HEARINGS.

(A)-(B) [Unchanged.]

(C) Findings. The court must make findings on whether reasonable

efforts have been made to establish permanent placement for the child, and may enter such orders as it considers necessary in the best interest of the child, including appointment of a juvenile guardian pursuant to MCL 712A.19c and MCR 3.979.

(D) [Unchanged.]

[MCR 3.979 is a new rule.]

RULE 3.979 JUVENILE GUARDIANSHIPS.

(A) Appointment of Juvenile Guardian; Process. If the court determines at a post-termination review hearing or a permanency planning hearing that it is in the child's best interest, the court may appoint a juvenile guardian for the child pursuant to MCL 712A.19a or MCL 712A.19c.

(1) Under MCR 3.979(A), the court shall order the Department of Human Services to:

(a) conduct a criminal record check and central registry clearance of the residents of the home and submit the results to the court within 7 days; and

(b) perform a home study with a copy to be submitted to the court within 28 days, unless a home study has been performed within the immediately preceding 365 days, in which case a copy of that home study shall be submitted to the court.

(2) If a child for whom a juvenile guardianship is proposed is in foster care, the court shall continue the child's placement and order the information required above about the proposed juvenile guardian. If the information required above has already been provided to the court, the court may issue an order appointing the proposed juvenile guardian pursuant to subrule (B).

(3) If the parental rights over a child who is the subject of a proposed juvenile guardianship have been terminated, the court shall not appoint a guardian without the written consent of the Michigan Children's Institute (MCI) superintendent. The court may order the Department of Human Services to seek the consent of the MCI superintendent. The consent must be filed with the court no later than 28 days after the permanency planning hearing or the post-termination review hearing.

(a) If a person or agency denied consent believes that the decision to withhold consent by the MCI superintendent is arbitrary or capricious, the person or agency may file a motion with the court. A motion under this subsection shall contain information regarding both of the following:

(i) the specific steps taken by the person or agency to obtain the consent required and the results, if any, and

(ii) the specific reasons why the person or agency believes that the decision to withhold consent was arbitrary or capricious.

(b) If a motion alleging that the MCI superintendent's failure to consent was arbitrary or capricious, the court shall set a hearing date and ensure that notice is provided to the MCI superintendent and all parties entitled to notice under MCR 3.921.

(c) If a hearing is held and the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary or capricious, the court may approve the guardianship without the consent of the MCI superintendent.

The court shall determine the continuing necessity and appropriateness of the child's placement.

(B) Order Appointing Juvenile Guardian. After receiving the information ordered by the court under subsection (A)(1), and after finding that appointment of a juvenile guardian is in the child's best interest, the court may enter an order appointing a juvenile guardian. The order appointing a juvenile guardian shall be on a form approved by the state court administrator. Within 7 days of receiving the information, the court shall enter an order appointing a juvenile guardian or schedule the matter for a hearing.

(1) Acceptance of Appointment. A juvenile guardian appointed by the court shall file an acceptance of appointment with the court on a form approved by the state court administrator.

(2) Letters of Authority. On the filing of the acceptance of appointment, the court shall issue letters of authority on a form approved by the state court administrator. Any restriction or limitation of the powers of the juvenile guardian must be set forth in the letters of authority.

(3) Certification. Certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the juvenile guardian or interested persons.

(4) Address of Juvenile Guardian; Notice. The juvenile guardian must keep the court informed in writing within 7 days of any change in the juvenile guardian's address. Notice of a proceeding relating to the juvenile guardianship shall be delivered or mailed to the juvenile guardian by first-class mail at the juvenile guardian's address as listed in the court records and to his or her address as then known to the petitioner. Any notice mailed first class by the court to the juvenile guardian's last address on file shall be considered notice to the juvenile guardian.

(C) Court Jurisdiction; Review Hearings; Lawyer Guardian ad Litem. The court's jurisdiction over a juvenile guardianship shall continue until terminated by court order. The court's jurisdiction over a juvenile under section 2(b) of the Probate Code, MCL 712A.2(b), and the jurisdiction of the MCI under section 3 or 1935 PA 220, MCL 400.203, shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing pursuant to MCR 3.975 when parental rights to the child have not been terminated, or a review hearing pursuant to MCR 3.978 when parental rights to the child have been terminated. The review hearing following appointment of the juvenile guardian must be conducted within 91 days of the most recent review hearing. The appointment of the lawyer-guardian ad litem in the child protective proceeding terminates upon entry of the order terminating the court's jurisdiction pursuant to MCL 712A.2(b). The court may reappoint the lawyer-guardian ad litem or may appoint a new lawyer-guardian ad litem if the court is satisfied that such action is warranted.

(D) Court Responsibilities.

(1) Annual Review. The court shall conduct a review of a juvenile guardianship annually. The review shall be commenced within 63 days after the anniversary date of the appointment of the guardian. The court may conduct a review of a juvenile guardianship at any time it deems necessary.

(2) Investigation. The court shall appoint the Department of Human Services or another person to conduct an investigation of the juvenile guardianship of a child when deemed appropriate by the court or upon petition by the Department of Human Services or an interested person.

The investigator shall file a written report with the court within 28 days of such appointment. The report shall include a recommendation regarding whether the juvenile guardianship should continue or be modified and whether a hearing should be scheduled. If the report recommends modification, the report shall state the nature of the modification.

(3) Judicial Action. After informal review of the report, the court shall enter an order denying the modification or set a date for a hearing to be held within 28 days.

(E) Duties and Authority of Guardian Appointed to Juvenile Guardianship. A juvenile guardianship approved under these rules is authorized by the Probate Code and is distinct from a guardianship authorized under the Estates and Protected Individuals Code.

(1) Report of Juvenile Guardian. A juvenile guardian shall file a written report annually within 56 days after the anniversary of appointment and at other times as the court may order. Reports must be on a form approved by the state court administrator. The juvenile guardian must serve the report on the persons listed in MCR 3.921.

(2) Petition for Conservator. At the time of appointing a juvenile guardian or during the period of the juvenile guardianship, the court shall determine whether there would be sufficient assets under the control of the juvenile guardian to require a conservatorship. If so, the court shall order the juvenile guardian to petition the probate court for a conservator pursuant to MCL 700.5401 *et seq*.

(F) Revocation or Termination of Guardianship.

(1) Motion or Petition.

(a) Revocation of Juvenile Guardianship. The court shall, on its own motion or upon petition from the Department of Human Services or the child's lawyer-guardian ad litem, hold a hearing to determine whether a juvenile guardianship established under this section shall be revoked.

(b) Termination of Juvenile Guardian and Appointment of Successor. A juvenile guardian or other interested person may petition the court for permission to terminate the guardianship. A petition may include a request for appointment of a successor juvenile guardian.

(2) Hearing. If a petition for revocation or termination is filed with the court, the court shall hold a hearing within 28 days to determine whether to grant the petition to revoke or terminate the juvenile guardianship.

(3) Investigation and Report. In preparation for the revocation or termination hearing, the court shall order the Department of Human Services to perform an investigation and file a written report of the investigation. The report shall be filed with the court no later than 7 days before the hearing. The report shall include the reasons for terminating a juvenile guardianship or revoking a juvenile guardianship, and a recommendation regarding temporary placement, if necessary.

(4) Notice. The court shall ensure that interested persons are given notice of the hearing as provided in MCR 3.920 and MCR 3.921. The court may proceed in the absence of interested persons provided that proper notice has been given. The notice must inform the interested persons of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, and an attorney for one of the parties.

(5) Action Following Motion or Petition to Revoke Juvenile Guardianship. After notice and a hearing on a petition to revoke the juvenile guardianship, if the court finds by a preponderance of evidence that continuation of the juvenile guardianship is not in the child's best interest, and upon finding that it is contrary to the welfare of the child to be placed in or remain in the juvenile guardian's home and that reasonable efforts were made to prevent removal, the court shall revoke the juvenile guardianship. The court shall enter an order revoking the juvenile guardianship and placing the child under the care and supervision of the Department of Human Services on a form approved by the state court administrator. Jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding upon entry of the order revoking the juvenile guardianship.

(6) Action Following Petition to Terminate Appointment of Juvenile Guardian. After notice and a hearing on a petition to terminate the appointment of a juvenile guardian, if the court finds it is in the child's best interest to terminate the appointment and if there is:

(a) no successor, the court shall proceed according to subrule (F)(5); or

(b) a successor, the court shall terminate the appointment of the juvenile guardian and proceed with an investigation and appointment of a successor juvenile guardian in accordance with the requirements of this rule, and the court's jurisdiction over the juvenile guardianship shall continue. An order terminating a juvenile guardianship and appointing a successor juvenile guardian shall be entered on a form approved by the state court administrator

(7) Dispositional Review Hearing. The court shall hold a dispositional review hearing pursuant to MCR 3.973 or MCR 3.978 within 42 days of revocation of a juvenile guardianship. The Department of Human Services shall prepare an updated case service plan and file it with the court no later than 7 days before the hearing. Subsequent post-dispositional review hearings shall be scheduled in conformity with MCR 3.974 and MCR 3.975.

Staff Comment: The proposed amendments of Rules 3.901, 3.903, 3.921, 3.965, 3.975, 3.976, 3.977, and 3.978, and new rule 3.979 of the Michigan Court Rules reflect the recent enactment of 2008 PA 199-203.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-29. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm

Orders Entered November 25, 2008:

PROPOSED AMENDMENT OF RULES 2.403, 2.404, 2.410, 2.411, AND 3.216 OF THE MICHIGAN COURT RULES. On the order of the Court, this is to advise that the Court is considering amendment of Rules 2.403, 2.404, 2.410, 2.411, and 3.216 of the Michigan Court Rules. **Please note that the order**

contains alternative options for the proposed language of MCR 2.403(M)(1). Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 2.403. CASE EVALUATION.

(A) Scope and Applicability of Rule.

(1) [Unchanged.]

(2) Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.~~; however, the court may except an action from case evaluation on motion for good cause shown if it finds that case evaluation of that action would be inappropriate.~~

(3) A court may except all or part of an action from case evaluation for good cause shown on motion or by stipulation of the parties, or by the court with the consent of the parties, if it finds that case evaluation of that action or part thereof would be inappropriate.

(4) [Renumbered but unchanged.]

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order ~~no earlier than 91 days~~after the filing of the answer

(a) on written stipulation by the parties,

(b) on written motion by a party, or

(c) on the judge's own initiative.

(2) Selection of an action for case evaluation has no effect on the normal progress of the action toward trial.

(C)-(G) [Unchanged.]

(H) Fees.

(1) ~~Within 14 days after the mailing of the notice of the case evaluation hearing, unless otherwise ordered by the court, e~~Each party must send ~~to the ADR clerk~~ a check for ~~$75~~$150 made payable in the manner and within the time specified in the notice of the case evaluation hearing. However, if a judge is a member of the panel, the fee is ~~$50~~ $100. If the order for case evaluation directs that payment be made to the ADR clerk, The ADR clerk shall arrange payment to the case evaluators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the case evaluators than that provided in this subrule.

(2) Only a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims. A person entitled to a fee waiver under MCR 2.002 is entitled to a waiver of fees under this rule.

(3) If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the case evaluators.

~~(4) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the case evaluation panel will then make separate awards for each claim, which may be individually accepted or rejected.~~

(4)~~(5)~~ Fees paid pursuant to subrule (H) shall be refunded to the parties if

(a) ~~—~~the court sets aside the order submitting the case to case evaluation or on its own initiative adjourns the case evaluation hearing, or

(b) the parties notify the ADR clerk in writing at least 14 days before the case evaluation hearing of the settlement, dismissal, or entry of judgment disposing of the action, or of an order of adjournment on stipulation or the motion of a party.

~~In the case of an adjournment, the fees shall not be refunded if the adjournment order sets a new date for case evaluation.~~ If case evaluation is rescheduled at a later time, the fee provisions of subrule (H) apply regardless of whether previously paid fees have been refunded. ~~Penalties for late filing of papers under subrule (I)(2) are not to be refunded.~~

(5) Fees paid pursuant to subrule (H) shall not be refunded to the parties if

(a) in the case of an adjournment, the adjournment order sets a new date for case evaluation and the fees are applied to the new date, or

(b) the request for and granting of adjournment is made within 14 days of the scheduled case evaluation, unless waived for good cause.

Penalties for late filing of papers under subrule (I)(2) are not to be refunded.

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, ~~A~~at least 14 days before the hearing, each party shall ~~file with the ADR clerk 3 copies of documents pertaining to the issues to be mediated and 3 copies of a concise summary setting forth that party's factual and legal position on issues presented by the action, and shall serve one copy of the documents and summary on each attorney of record. A copy of a proof of service must be attached to the copies filed with the ADR clerk.~~

(a) serve a copy of the case evaluation summary and supporting documents in accordance with MCR 2.107; and

(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

(2) Each ~~F~~failure to timely file and serve the ~~required~~ materials identified in subrule (1), ~~with the ADR clerk or to serve copies on each~~

~~attorney of record by the required date~~ and each subsequent filing of supplemental materials within 14 days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) The case evaluation summary shall consist of a concise summary setting forth that party's factual and legal position on issues presented by the action. Except as permitted by the court, the summary shall not exceed 20 pages double spaced, exclusive of attachments. Quotations and footnotes may be single spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point font.

(J) [Unchanged.]

(K) Decision.

(1) [Unchanged.]

(2) Except as provided in subrule (H)(3), the evaluation must include a separate award as to ~~the~~ each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3)-(5) [Unchanged.]

(L) [Unchanged.]

(M) Effect of Acceptance of Evaluation.

******Alternative A******

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered. The judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing, including cases involving rights to personal protection insurance benefits under MCL 500.3101 *et seq*.

******Alternative B******

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits

under MCL 500.3101 *et seq*, for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing.

(2) If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims.

(3) [Renumbered but unchanged.]

(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs.

(1)-(4) [Unchanged.]

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) [Unchanged.]

(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution process, at the expense of the parties, pursuant to MCR 2.410(C)(1).

(8)-(11) [Unchanged.]

RULE 2.404. SELECTION OF CASE EVALUATION PANELS.

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(4) [Unchanged.]

(5) *Reapplication.* Persons shall be placed on the list of case evaluators for a fixed period of time, not to exceed seven ~~5~~ years, and must reapply at the end of that time in the ~~same~~ manner directed by the court ~~as persons seeking to be added to the list~~.

(6)-(8) [Unchanged.]

(C) [Unchanged.]

(D) Supervision of Selection Process.

(1) The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's case evaluation plan at least annually to assure compliance with this rule. In the event of non-compliance, the court shall take such action as is needed. This action may include recruiting persons to serve as case evaluators or changing the court's case evaluation plan. ~~The court shall submit an annual report to the State Court Administrator on the operation of the court's case evaluation program on a form provided by the State Court Administrator.~~

(2) [Unchanged.]

RULE 2.410. ALTERNATIVE DISPUTE RESOLUTION.

(A) [Unchanged.]

(B) ADR Plan.

(1)-(2) [Unchanged.]

(3) The plan may also provide for referral relationships with local dispute resolution centers, including those affiliated with the Community Dispute Resolution Program. In establishing a referral relationship with centers or programs, courts, at a minimum, shall take into consideration factors that include whether parties are represented by counsel, the number and complexity of issues in dispute, the jurisdictional amount of the cases to be referred, and the ability of the parties to pay for dispute resolution services. The plan must preserve the right of parties to stipulate to the selection of their own mediator under MCR 2.411(B)(1).

(4) [Unchanged.]

(C) Order for ADR.

(1) At any time, ~~after consultation with the parties~~, the court may order that a case be submitted to an appropriate ADR process. More than one such order may be entered in a case.

(2)-(3) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 2.411. MEDIATION.

(A) [Unchanged.]

(B) Selection of Mediator.

(1)-(3) [Unchanged.]

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

~~(4)~~(5) [Renumbered but unchanged.]

(C) [Unchanged.]

(D) Fees.

(1) A mediator is entitled to reasonable compensation ~~based on an hourly rate~~ commensurate with the mediator's experience and usual charges for services performed.

(2)-(5) [Unchanged.]

(E) List of Mediators

(1) *Application.* ~~An eligible person desiring t~~To appear on a roster ~~serve as a mediator~~, an applicant may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

(a) The form shall include a certification that

(i) the applicant meets the requirements for service under the court's selection plan;

(ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and

(iii) the applicant ~~mediator~~ will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (G).

(b) The applicant shall indicate on the form the applicant's ~~hourly~~ rate for providing mediation services.

(c) The form shall include an optional section identifying the applicant's gender and racial/ethnic background.

(d) A Community Dispute Resolution Program center may appear on a roster of mediators, provided that the center selects only mediators who meet the qualifications of this rule or training requirements established by the State Court Administrator to mediate cases ordered by the court.

(2) *Review of Applications.* The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.

(a) ~~Persons~~ Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period, not to exceed ~~5~~ seven years, and must reapply at the end of that time in the ~~same~~ manner ~~as persons seeking to be added to the list~~ directed by the court.

(b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.

(c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.

(d) An applicant may attach a résumé or biographical information to the application.

(3)-(4) [Unchanged.]

(F) Qualifications of Mediators.

(1) [Unchanged.]

(2) General Civil Mediation. To be eligible to serve as a general civil mediator, a person must meet the following minimum qualifications:

(a)-(b) [Unchanged.]

(c) Upon completion of the training required under subrule (F)(2)(a), ~~O~~observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator.

(3)-(5) [Unchanged.]

(G) [Unchanged.]

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A)-(D) [Unchanged.]

(E) Selection of Mediator.

(1)-(2) [Unchanged.]

(3) If the parties have not stipulated to a mediator:~~,~~

(a) the parties must indicate whether they prefer a mediator who is willing to conduct evaluative mediation. Failure to indicate a preference will be treated as not requesting evaluative mediation.

(b) ~~(4)If the parties have not stipulated to a mediator, the judge may recommend, but not appoint one. If the judge does not make a recommendation, or if the recommendation is not accepted by the parties,~~ the ADR clerk will assign a mediator from the list of qualified mediators maintained under subrule (F). The assignment shall be made on a rotational basis, except that if the parties have requested evaluative mediation, only a mediator who is willing to provide and evaluation may be assigned.

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

(5) [Unchanged.]

(F) List of Mediators.

(1) *Application.* An applicant ~~eligible person desiring to serve as a domestic relations mediator~~ may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

(a) The form shall include a certification that

(i) the applicant meets the requirements for service under the court's selection plan;

(ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and

(iii) the applicant ~~mediator~~ will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (K).

(b) The applicant shall indicate on the form whether the applicant is willing to offer evaluative mediation, and the applicant's ~~hourly~~ rate for providing mediation services.

(c) [Unchanged.]

(2) *Review of Applications.* The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.

(a) ~~Persons~~ Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period of time, not to exceed ~~5~~ seven years, and must reapply at the end of that time in the ~~same~~ manner ~~as persons seeking to be added to the list~~ directed by the court.

(b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.

(c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.

(d) An applicant may attach a résumé or biographical information to the application.

(e) A Community Dispute Resolution Program center may appear on a roster of mediators, provided that the center selects only mediators meeting the qualifications of this rule or those training requirements established by the State Court Administrator to mediate cases ordered by the court.

(3)-(4) [Unchanged.]

(G) Qualifications of Mediators.

(1) To be eligible to serve as a domestic relations mediator under this rule, an applicant must meet the following minimum qualifications:

(a) The applicant must

(i) be a licensed attorney, a licensed or limited licensed psychologist, a licensed professional counselor, a licensed marriage and family therapist;

(ii) have a master's degree in counseling, social work, or marriage and family therapy;

(iii) have a graduate degree in a behavioral science; or

(iv) have five years experience in family counseling.

(b) The applicant must have completed a training program approved by the State Court Administrator providing the generally accepted components of domestic relations mediation skills.

(c) Upon completion of the training required under subrule (G)(1)(b), ~~The applicant must have~~ observed two domestic relations mediation proceedings conducted by an approved mediator, and ~~have~~ conducted one domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(2)-(4) [Unchanged.]

(H)-(K) [Unchanged.]

Staff Comment: The proposed amendments of Rules 2.403, 2.404, 2.410, and 2.411 would revise and update the court rules relating to mediation and case evaluation as recommended by the Dispute Resolution Rules Committee convened by the State Court Administrative Office. The committee's report can be found at http://courts.michigan.gov/scao/resources/publications/reports/DRRCReport2008.pdf. The proposal also contains proposed changes of MCR 3.216 recommended by staff to reflect the changes suggested by the committee of the other rules in the proposal.

***Please note that the proposed order contains alternative options for MCR 2.403(M)(1). Alternative A, recommended by the committee, would allow subsequent claims to be raised following disposition pursuant to case evaluation, if the claim had not arisen at the time of case evaluation, including in cases that involve personal protection benefits under MCL 500.3101 *et seq*. Alternative B would allow subsequent claims to be brought only in PIP cases; in all other cases, the acceptance of a case

evaluation award would be deemed to dispose of all claims in a case, including any that might arise after case evaluation.***

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2009, at P.O. Box 30052, Lansing, MI, 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File Nos. 2005-05 and 2006-20. Your comments and the comments of others will be posted at: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENTS OF JUVENILE COURT STANDARDS AND ADMINISTRATIVE GUIDLENES FOR THE CARE IF CHILDREN. On order of the Court, this is to advise that the Court is considering amendment of Administrative Order No. 1985-5. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

Pursuant to Administrative Order No. 1985-5, this Court adopted the *Juvenile Court Standards and Administrative Guidelines for the Care of Children,* ~~the Standards to take effect on May 1, 1985 and to expire on May 1, 1988~~ as amended by Administrative Order No. 1988-3. We now order that the ~~Juvenile Court Standards and Administrative Guidelines~~ *Juvenile Court Standards and Administrative Guidelines* continue in effect, as modified ~~infra~~ below, until the further order of this Court:

JUVENILE COURT STANDARDS AND ADMINISTRATIVE GUIDELINES FOR THE CARE OF CHILDREN

I. Court administrators, supervisory personnel, county juvenile officers, probation officers, caseworkers, and personnel of court-operated child care facilities shall meet the following minimum standards in order to qualify for employment, unless the state court administrator grants an exception under I(G). *Desired standards are those preferred qualifications that extend beyond minimal standards but are not required to perform the job function.*

These standards shall apply only to new staff hired by the juvenile court on or after the effective date of these standards. A court employee

who is currently in a position that was approved under regulations that preceded the implementation of these standards shall be deemed qualified for that position. A court-appointed person hired ~~subsequent to~~after the effective date of these standards shall meet the minimum qualification of these standards for that position.

A. *Court Administrator/Director.* The person in the juvenile court who is directly responsible to the chief or presiding probate judge and who is delegated administrative responsibilities for the operation of the court.

A court administrator, at the time of appointment, shall possess the following qualifications:

1. Education and Experience:

a. Desired Standards:

(1.) Master's degree in social sciences, business or public administration, education, criminal justice, a related field that qualifies the person to manage or supervise the delivery of juvenile services, or a law degree, with a minimum of four years of supervisory experience with juvenile court staff.

b. Minimum Standards

(1.) Master's degree in social sciences, business or public administration, education, criminal justice, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, or a law degree, with a minimum of one year of experience working with juvenile court staff or related human service field.

(2.) A bachelor's degree in those same areas and two years of supervisory experience working with juvenile court staff or related human services field. (Courts with only one level of supervision may use two years of casework experience in lieu of supervisory experience.)

c. [Unchanged.]

B. *Supervisory Personnel.* Those directly responsible for ongoing supervision of professional and support staff providing direct services to children, youth, and their families.

A supervisor, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1.) Master's degree in social work, education, ~~or~~ a human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, with one year of professional experience in juvenile court work.

b. Minimum Standards

(1.) A bachelor's degree in social sciences, education, ~~or~~ a human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, with two years of professional experience with a juvenile court staff or in a child welfare agency.

c. [Unchanged.]

C. *Direct Services: Probation Officers/Casework Staff.* The professional staff who work directly with children and their families and other

relevant individuals and who are primarily responsible for the development, implementation and review of plans for children, youth and their families.

Each county shall provide for a minimum of one delinquency probation officer/casework staff person (but exclusive of clinical staff and detention home personnel) for every 6,000 (or major fraction thereof) children under 19 years of age in the county.

A probation officer/caseworker, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1.) Bachelor's degree in social work, criminal justice, education, ~~or~~ behavioral sciences, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, with two years of casework experience in juvenile court or a related child welfare agency and must complete the Michigan Judicial Institute certification training for juvenile court staff within two years after date of employment.

b. Minimum Standards

(1.) Bachelor's degree in social sciences, education, or a related human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and must complete the Michigan Judicial Institute certification training for juvenile court staff within two years after date of employment.

c. [Unchanged.]

D. *Administrator of County Child Care Facility.* The person responsible to the chief or presiding probate judge or to the juvenile court administrator and to whom is delegated overall administrative responsibility for the day-to-day operation of county child care facilities operated by the court.

The administrator, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1.) Master's degree in social work, sociology, psychology, guidance and counseling, education, business administration, criminal justice, ~~or~~ public administration, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and two years of supervisory experience in a juvenile court, public or private child care facility.

b. Minimum Standards

(1.) Same as above with a minimum of one year of supervisory experience in a juvenile court, public or private child care facility.

(2.) Bachelor's degree in social science, education, or human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and two years of experience in a juvenile court, public or private child care facility.

c. [Unchanged.]

E. *Child Care Staff Supervisor* The child care supervisor is directly responsible for supervision of child care workers in the facility.

The child care supervisor, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1:) Bachelor's degree in social work, psychology, sociology, education, criminal justice or related human services field or a related field that qualifies the person to manage or supervise the delivery of juvenile services, with two years of experience with a juvenile court or a public or private child care agency.

b. Minimum Standards

(1:) Two years of college in a human services or education field or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and two years of work experience in a child care institution.

c. [Unchanged.]

F. *Child Care Worker*. The person who provides direct care of children in the facility.

A child care worker, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1:) Bachelor's degree in social sciences, ~~or~~ human services, or related field, which qualifies the person to work with juveniles.

b. Minimum Standards

(1:) A high school diploma or its equivalent.

c. [Unchanged.]

G. *Exceptions.* The state court administrator may authorize a court to hire an employee who does not meet the education requirements established in these standards if the court provides a reasonable period within which the candidate must meet the education standards.

H. A bachelor's degree or other postsecondary degree is a degree from a college or university that is accredited by an accrediting body of the Council for Higher Education Accreditation.

II. [Unchanged.]

Staff Comment: This proposal would expand the eligible education categories prospective employees (including administrators, supervisory personnel, county juvenile officers, probation officers, caseworkers, and personnel of court-operated child care facilities) must meet to be considered for employment. In addition, the proposal would allow the state court administrator to waive the employment standards if the court provides a reasonable period within which the candidate must meet the education standards, and establishes minimum accreditation requirements.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar of Michigan and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or

MSC_clerk@courts.mi.gov. All comments received within the public comment period will be posted on the Court's website at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. When filing a comment, please refer to ADM File No. 2008-40.

Order Entered December 8, 2008:

In re HON CATHERINE BOVE STEENLAND, No. 137511. The Judicial Tenure Commission has issued a Decision and Recommendation for an Order of Discipline, to which the respondent, 39th District Court Judge Catherine Bove Steenland, consents. It is accompanied by a Settlement Agreement, in which the respondent waived her rights and consented to a public censure and a 90-day suspension without pay.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292 and 1293 (2000):

[E]verything else being equal:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

> 1. The respondent was, at all material times, a judge of the 39th District Court, Macomb County, Michigan.

2. As a judge, she is subject to all the duties and responsibilities imposed on her by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

3. On June 7, 2008, the respondent was operating a motor vehicle on North Ogemaw Trail, a highway in Ogemaw County, Michigan, after consuming beer.

4. As a result of the respondent's alcohol consumption, the respondent was intoxicated.

5. After being placed under arrest, the respondent submitted to a blood alcohol test, which showed a result of 0.23 grams per 100 milliliters of blood.

6. On July 17, 2008, in 82nd District Court in West Branch, Michigan, the respondent pleaded guilty to, and was convicted of, operating a motor vehicle while visibly impaired, contrary to MCL 257.625(3).

7. The respondent has pled guilty to the commission of a misdemeanor designed to promote public safety. The commission of a crime by a judge erodes public confidence in the judiciary, which is prejudicial to the administration of justice.

After reviewing the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *Brown*, and the above findings of fact, we accept the recommendation of the commission and order that the Honorable Catherine Bove Steenland be publicly censured and suspended without pay for 90 days, effective December 18, 2008. This order stands as our public censure.

Orders Entered December 9, 2008:

PROPOSED AMENDMENT OF RULE 2.112 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendment of Rule 2.112 of the Michigan Court Rules. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(K)[Unchanged.]

(L) Medical Malpractice Actions. In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d~~,~~ and 600.2912e.

(1) *Sufficiency of Affidavit.* An affidavit of merit filed under MCL 600.2912d is presumed to be valid and tolls the period of limitations. However, if the court determines upon a party's challenge to the sufficiency of the affidavit that the affidavit is deficient, the court shall dismiss the action without prejudice. Following dismissal, the plaintiff may file a complaint accompanied by a conforming affidavit of merit within the time that remains in the period of limitations.

(2) *Notice.* Notice of filing an~~the~~ affidavit under MCL 600,2912d or 600.2912e must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

Staff Comment: This proposed amendment would clarify the rules regarding affidavits of merit as expressed in *Kirkaldy v Rim*, 478 Mich 581 (2007). It would establish a presumption of validity for an affidavit of merit upon filing and would require that a party challenge the sufficiency of an affidavit of merit before it can be determined to be deficient. If a court finds the affidavit deficient, the action would be dismissed. The party would then have the period of time remaining in the statutory limitations period in which to file a complaint with a conforming affidavit of merit.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments received within the public comment period will be posted on the Court's website at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. When filing a comment, please refer to ADM File No. 2007-07 and ADM File No. 2006-43.

PROPOSED AMENDMENT OF RULE 611 OF THE MICHIGAN RULES OF EVIDENCE. On order of the Court, this is to advise that the Court is considering amendment of Rule 611 of the Michigan Rules of Evidence. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION.

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Appearance of Parties and Witnesses. The court shall exercise reasonable control over the appearance of parties and witnesses so as to

(1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder, and

(2) to ensure the accurate identification of such persons.

~~(b)~~-(c)[Renumbered (c)-(d), but otherwise unchanged]

Staff Comment: This proposed amendment would clarify that a judge is entitled to establish reasonable standards regarding the appearance of parties and witnesses to evaluate the demeanor of those individuals and to ensure accurate identification.

The proposal was suggested in response to a case in which a district judge was sued for dismissing a plaintiff's case following the plaintiff's refusal to remove her hijab during testimony. The plaintiff subsequently sued the district judge in federal court, alleging a violation under 42 USC 1983 (*Muhammad v Paruk,* 553 F Supp 2d 893 [ED Mich, 2008]). The federal court declined to exercise jurisdiction and dismissed the case, which has since been appealed. In declining to exercise jurisdiction, the federal court noted that state court review "would have avoided many of the federalism concerns" cited by the court, which prompted consideration of this proposal by the Michigan Supreme Court.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments received within the public comment period will be posted on the Court's website at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. When filing a comment, please refer to ADM File No. 2007-13.

Order Entered December 16, 2008:

PROPOSED AMENDMENT OF RULE 3.101 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.101 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be

considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(G) [Unchanged.]

(H) Disclosure. The garnishee shall mail or deliver to the court, the plaintiff, and the defendant, a verified disclosure within 14 days after being served with the writ.

(1) Nonperiodic Garnishments.

(a)-(b) [Unchanged.]

(c) If the garnishee is indebted to the defendant, but claims that withholding is exempt under MCR 3.101(I)(6), the garnishee shall indicate on the disclosure the specific exemption. If the garnishee is indebted, but claims the withholding is exempt for some reason other than those set forth in MCR 3.101(I)(6), the garnishee shall indicate on the disclosure the basis for its claim of exemption and cite the legal authority for the exemption.

(2) [Unchanged.]

(I) Withholding. This subrule applies only if garnishee is indebted to or obligated to make periodic payments to the defendant.

(1)-(5) [Unchanged.]

(6) A bank or other financial institution as garnishee shall not withhold exempt funds of the debtor from an account into which only exempt funds are directly deposited and where such funds are clearly identifiable upon deposit as exempt Social Security benefits, Supplemental Security Income benefits, Railroad Retirement benefits, Black Lung benefits, or Veterans Assistance benefits.

(J)-(T) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.101 would add language to protect exempt funds from garnishment and would require financial institutions to provide authority stating why certain funds are exempt.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-41. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

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INDEX–DIGEST

ADMINISTRATIVE LAW

AGENCIES

1. The proper standard of review for a court reviewing an agency's interpretation of a statute requires respectful consideration of the agency's interpretation and cogent reasons when overruling it, with the court's primary consideration being whether the agency's interpretation is consistent with the plain language of the statute. *In re Rovas Complaint*, 482 Mich 90.

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CRIMINAL PROCEDURE

1. The United States Supreme Court decision in *Halbert v Michigan*, 545 US 605 (2005), holding that indigent defendants who plead guilty of criminal offenses are entitled to appointed counsel on direct appeal, does not apply retroactively to cases in which a defendant's conviction became final before *Halbert* was decided. *People v Maxson*, 482 Mich 385.

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1. The admissibility of nontestimonial hearsay is governed solely by MRE 804(b)(3) and does not implicate a defendant's constitutional right to confront witnesses (US Const, Am VI; MRE 804[b][3]). *People v Taylor*, 482 Mich 368.

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GOVERNMENTAL IMMUNITY

GOVERNMENTAL EMPLOYEES

1. A governmental employee enjoys qualified immunity from liability for intentional torts; the governmental employee must raise governmental immunity as an affirmative defense and establish (1) that the employee undertook the challenged acts during the course of employment and that the employee was acting, or reasonably believed that he or she was acting, within the scope of his or her employment, (2) that the employee undertook the acts in good faith, or did not undertake them with malice, and (3) that the acts were discretionary, rather than ministerial, in nature (MCL 691.1407[3]). *Odom v Wayne Co*, 482 Mich 459.

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1. Financial hardship to firefighters is not a proper basis for granting injunctive relief against a proposed layoff of firefighters because the harm is not irreparable and can be adequately remedied by damages at law. *Pontiac Fire Fighters Union v Pontiac*, 482 Mich 1.

2. A mere apprehension that a proposed reduction in firefighting staff will result in reduced safety for those remain-

ing is insufficient grounds for a court to grant injunctive relief; a plaintiff must make a particularized showing that there exists a real and imminent danger of irreparable harm if an injunction does not issue. *Pontiac Fire Fighters Union v Pontiac*, 482 Mich 1.

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1. The Michigan Catastrophic Claims Association has the authority to refuse to indemnify unreasonable charges for personal protection insurance benefits if the member insurer's policy provides coverage only for reasonable charges (MCL 500.3104). *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 482 Mich 414.
2. An insurer is not statutorily required to reconcile the opinions of its independent medical examiner and an insured's treating physician before refusing to pay work-loss benefits (MCL 500.3142[2], MCL 500.3148[1]). *Moore v Secura Ins*, 482 Mich 507.
3. An insurer's initial refusal to pay no-fault insurance benefits cannot be deemed unreasonable for purposes of awarding attorney fees if it is later determined that the insurer was not required to pay those benefits (MCL 500.3148[1]). *Moore v Secura Ins*, 482 Mich 507.

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JURY

JUROR QUALIFICATIONS

1. A violation of the statute prohibiting a convicted felon

from serving on a jury requires a new trial only if the violation actually prejudiced the defendant; the juror's failure to disclose a felony conviction is only prejudicial if it denied the defendant an impartial jury; the defendant has the burden of establishing that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt (MCL 600.1307a[1][e], 600.1354[1]). *People v Miller*, 482 Mich 540.

LABOR RELATIONS

See, also, INJUNCTIONS 1, 2

POLICE AND FIRE DEPARTMENTS

1. An action that affects safety, which is a mandatory subject of bargaining and "condition of employment," may not be undertaken during the pendency of compulsory arbitration of a labor dispute in a municipal police or fire department without violating the status quo provision of the compulsory arbitration statute (MCL 423.243). *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18.
2. A claim that an employer's action jeopardizes the safety of police or firefighters in violation of the status quo provision of the compulsory arbitration statute can be established only by demonstrating that the action is inextricably intertwined with safety, and not merely that it arguably affects safety (MCL 423.243). *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18.
3. When determining whether to grant preliminary injunctive relief where a party alleges a status quo violation during the compulsory arbitration of a labor dispute in a municipal police or fire department, a court must consider whether the moving party made the required showing of irreparable harm, whether harm to the applicant absent an injunction outweighs the harm it would cause to the adverse party, whether the moving party demonstrated that the underlying claim is likely to succeed on the merits, and whether the public interest will be harmed if an injunction is issued (MCL 423.231 *et seq*.). *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18.
4. If a court grants preliminary injunctive relief where there is an alleged status quo violation, the court must then decide the merits of the status quo claim within six months after the injunction is granted unless good cause is shown or the parties stipulate to a longer period (MCL 423.231 *et seq*.; MCR 3.310[A][5]). *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18.

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SENTENCES

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1. The habitual offender statutes require a sentencing court to count each separate felony conviction that preceded the

sentencing offense when determining an offender's habitual offender status, regardless of whether any of the convictions arose out of the same criminal act or incident (MCL 769.11[1]; MCL 769.12[1]). *People v Gardner*, 482 Mich 41.

SENTENCING GUIDELINES

2. A trial court must articulate the rationale for any departure it makes from the minimum sentence range recommended under the sentencing guidelines; a court reviewing a departure may not substitute its own reasons for departure, nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the court articulated (MCL 769.34[3]). *People v Smith*, 482 Mich 292.

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1. The statutory provision that prohibits a telecommunication service provider from making a false, misleading, or deceptive statement or representation regarding its service applies only to statements or representations that are intentionally false (MCL 484.2502[1][a]). *In re Rovas Complaint*, 482 Mich 90.

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